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CHARACTER-EVIDENCE IN CIVIL CASES.

It has elsewhere appeared that in criminal cases, the character of the accused is receivable in evidence simply as a fact evidential of the improbability of his having committed the act, which he is accused of, or of having committed it with the intent, the motive, the knowledge, the malice or other state of mind with which he is accused of having committed it. It may be said, generally, that in civil cases, no similar use can be made of character. If the question is, whether A did or did not do an act, or whether in doing it, he had a certain intent or knowledge, etc., his character, however strongly it may extrajudicially persuade that he did not do or did do the act, or that, doing it, he had or did not have the intent, knowledge, motive, cannot be proven in order, alone or in conjunction with other evidence, to prove or disprove the doing of the act or the doing of it with the subjective accompaniments.

A constant character for honesty makes a particular act of fraud improbable. Nevertheless, the plaintiff cannot, when the plea and evidence of the defendant impute fraud to him, give evidence of his good character, for the purpose of rebutting the evidence of the defendant. The executor, *e. g.*, of A suing on a bond, the defense of B was fraud in the making of a contract which was for the sale of land to B, payment, deficiency in the quantity of land. The trial court declined in rebuttal to receive evidence of the good character of A and properly.[1] On the other hand, if the plaintiff's cause of action, or the evidence to support it, is based upon or tends to show a dishonest act of the defendant, or of his testator or intestate, he will not be allowed to educe, even by cross examination of the plaintiff's witnesses, testimony as to the general character of the defendant, or his testator, or intestate. "There cannot be the least doubt," said Gibson, J., "but the evidence was improperly received. Gilkeson's general character was not put in issue by the nature of the action, and it never was pretended, that where a party is incidentally charged by the evidence, with a commission of a particular fraud, that the charge can be rebutted by evidence of general good character. To this rule I know of no exception."[2] In trespass for the conver-

[1] Anderson's Executors v. Long, 10 S. & R. 55.
[2] Nash v. Gilkeson, 5 S. & R. 352.

sion of a quantity of yarn, delivered to the defendant to be dyed, the defendant tried to show that it had been delivered to him as agent for a corporation, and that the corporation had used it. To render improbable his personal appropriation of it, he could not prove his good character.[1]

As the good character of a party cannot be shown, neither can the bad, as evidential of other facts. Thus, in debt on a sealed note, the defendant, in order apparently to corroborate his evidence that it had been paid, proposed to prove the plaintiff's character as to honesty. It was not properly receivable.[2] "The evidence," said the Supreme Court, "in derogation of the plaintiff's character, which was not put in issue by the pleadings, ought not to have been received." In an action for breach of promise of marriage, testimony that the plaintiff had been guilty of immodesty, could not be contradicted by proof of her general good conduct and character.[3]

In Battles v. Loudenslager,[4] a different use of character was attempted. A had executed a promissory note to B or order, upon which C, as endorsee, brought suit against A. A, showing that a fraud had been practiced upon him by B, found it necessary to show further, that C, when he purchased the note, had knowledge of the fraud, or at least such suspicion of it as made him a *mala fide* purchaser. In order to do this, A proved various circumstances, viz: C's knowledge of B's insolvency; the badness of B's character for honesty and integrity, which was known to C; the purchase by C at the same time of a large number of other notes, which had been procured by B, by means of the same kind of fraud, etc. The Supreme Court, Sterrett, J., remarks, "The character of Sullivan (B) for honesty and integrity in 1871 2, was irrelevant, and could have no other tendency than to mislead or prejudice the jury. * * * * His general reputation for honesty was in no way involved in the case." Knowledge of this reputation was proof neither that C suspected, nor that he ought to have suspected B's fraud on A, or to have inquired from A; that is, it was not proof to C of the probability of the specific fraud.

The act which is imputed to the party, may be criminal, and although character-evidence against its commission would be receivable in a prosecution for it, such evidence will not be receivable in a civil action. In a civil action for assault and battery, *e. g.*, the defendant may not repel the evidence of his guilt or even of his malice by proof of good character;[5] and in an action on a policy of fire insurance, which the insurer defends by evidence that the plaintiff set fire to the building in order to defraud him, the plaintiff cannot employ his good character to repel the charge.[6] In an action for seduction the defendant cannot prove his "uniform good character."[7]

It is not clear whether, in some of the cases just considered, reliance

[1] Wood v. Bradbury, 42 L. I. 436.
[2] Atkinson v. Graham, 5 W. 411.
[3] Leckey v. Bloser, 24 Pa. 401.
[4] 84 Pa. 446.
[5] Porter v. Seiler, 23 Pa. 424.
[6] American Fire Insurance Co. v. Hazen, 110 Pa. 530.
[7] Zitzer v. Merkel, 24 Pa. 399.

was had upon the character or the reputation for character. In the case of assault and battery, in order to rebut any inference of malice, the defendant offered to prove his "general character—that it was uniformly good—that he was reputed peaceable and orderly;" and the offer was rejected.[1] In the action on the insurance policy, the endeavor was to show the "reputation of the plaintiffs * * * * as peaceable, orderly, honest and good citizens, to rebut the allegation * * * * that they burned this mill."[2] The improper evidence in Atkinson v. Graham,[3] is described as being in derogation of the plaintiff's "character as to honesty;" in Anderson v. Long, [4] concerning the "character" of the plaintiff "for integrity," and in Nash v. Gilkeson,[5] the "general character" of the plaintiff was put in evidence by the defendant.

As evidence of good character for the purpose of proving a specific fact is not admissible, so the "assumed good character," *e. g.*, of the testator of the plaintiff, who sues on a due bill, cannot be made the basis of an inference. The question being, *e. g.*, whether the due bill has been paid, and no evidence as to the character of the deceased payee being given, the court commits an error when it tells the jury that the "assumed good character" of the decedent is corroborative of other evidence that the due bill has not been paid.[6]

FORMER ACTS.

In an action for injury arising from the operation of an elevator, the defendant alleged that the plaintiff was hurt in attempting to leave the elevator while it was in motion. The evidence as to this attempt was seriously conflicting, the plaintiff's testimony being contradicted by the operator of the elevator, who was somewhat corroborated by the only two other passengers on it at the time. It was held proper to exclude evidence that the plaintiff, a boy of 16 years, had made a practice of jumping from the elevator while in motion. What the boy had done would, it is said, warrant an inference so "remote," as to make the evidence inadmissible. "Men do not usually risk life or limb without motive" says Dean, J., "and the fact that a man has done so once or oftener, does not warrant the induction that he did so on the particular occasion in controversy."[7] That a man has uniformly acted under certain conditions in a certain way, does warrant the inference, with some degree of probability, that on the repetition of the conditions he acted in a similar way. When, as in the case cited, there was a conflict

[1] Porter v. Seiler, 23 Pa. 424.
[2] American Fire Insurance Co. v. Hazen, 110 Pa. 530.
[3] 5 W. 411.
[4] 10 S. & R. 55.
[5] 5 S. & R. 352.
[6] Fullam v. Rose, 181 Pa. 138. But it was the absence of evidence as to the good character, that made the reference to the "assumed" good character erroneous, in the judgment of Sterrett, C. J.
[7] Baker v. Irish, 172 Pa. 528. In Lauer v. Posey, 15 Super. 543, an action by the endorsee against the maker of a note, one defense was that the note had been raised from $100 to $400. Other notes, alleged to have been forged by the same person, the payee, but with which neither the plaintiff nor the defendant had any relation, were for some reason, received in evidence.

of evidence as to how the boy acted, his usual way of acting would surely be of value, for the ordinary reasoner, in determining which of the witnesses was telling the truth.

EVIDENCE OF BAD CHARACTER OF NON-PARTY.

In ejectment A claims under warrants of 1763 on which was a survey in 1765, and B, the defendant, under warrants of 1762. A deputy surveyor having an interest in them, executed the former. It was the custom when warrants were issued, to make a payment to the State, which payment was marked on the warrant. There was no such mark on these warrants under which the plaintiff claimed. This tended to show that these warrants had been fraudulently obtained by the deputy surveyor. It was, however, proper for the Court to reject the defendant's offer to prove that the character—probably the reputation—of the deputy surveyor was bad. He was, says the Court, not a witness. The title of the plaintiff was not to be injured by his character, even though the former claimed under him. "Matters of property," said Tilghman, C. J., "are not to be decided by the character of the parties. In criminal cases the defendant is permitted to give evidence of his own good character, and, if he does, he may be contradicted by evidence on the part of the prosecution. But in civil actions, evidence of character is not permitted, except in certain actions where from the nature of the case, the plaintiff puts his character in issue."[1] In Postens v. Postens[2] the plaintiff in ejectment claimed under a sheriff's sale of X's land, after his death, and the defendant under a grant from X in his lifetime, which the plaintiff alleged to be without consideration, and in fraud of creditors of whom he was one. One of the existing debts was to himself. He proved a settlement with X, for whom he had worked for a series of years, which was made in the presence of and signed by three persons. The witness who testified to the settlement was cross-examined by the defendant as to X's being aged, of poor hearing, paralytic, falling asleep in the midst of business, and as to the circumstances of the settlement, the manner in which these three persons conducted themselves in their inquiries and examinations, during the settlement and the footing they were on with them. The plaintiff was then allowed to ask what the character and standing of the three men were. The witness replied that they stood fair, as far as he knew, and stated that they were not arbitrators, but were called in to help the parties settle. Sergeant, J., remarking that the previous cross-examination having tended to question the mode in which these persons conducted themselves, and the fitness of X to transact such business, and involved indirectly a reflection on those who sanctioned the settlement, adds "But it is sufficient that in looking to the answer of the witness it amounts to no more than the law of itself would imply without proof, that their characters stood fair. This being the case, it could have done no prejudice to the defendant, even admitting that it would not otherwise have been strictly proper."

[1] Blackburn v. Holliday, 12 S. & R. 140.
[2] 3 S. & R. 127.

WHEN CHARACTER IS IN ISSUE.

There are civil actions in which the character of a party, or of another specially connected with him, is said to be in issue, and in such cases, this character may be put in evidence. "Putting character in issue," says Tilghman, C. J., "is a technical expression and confined to certain actions, from the nature of which the character of the parties, or some of them, is of particular importance. Such is the action brought by one man against another, for seducing his wife, and having criminal connection with her. There the injury done to the plaintiff consists mainly (*sic*) in the good conduct of his wife, before her seduction, and therefore, the defendant is permitted to show that she was unchaste. So in an action of slander, the plaintiff in his declaration, asserts his own good character, and avers the intent of the defendant to rob him of it. He puts his character in issue, therefore, and the defendant is at liberty to impeach it."[1] When the action seeks to recover damages, altogether or in part for injury to a reputation, the question is, what is the value of that reputation? It is competent for the defendant to disclose any defects in it, prior to his having done the act which is the gravamen of the complaint, in order to show that the reputation he damaged had less than the normal value. But the mere fact that the evidence of one party, or a verdict in his favor, would damage the reputation of the other party, does not so put his character in issue as to warrant evidence of prior good character in defense. That the establishment, *e. g.*, by an insurance company, of the defense that the plaintiff set fire to the building himself, would hurt his reputation, does not justify his offer of evidence that it has been good.[2]

ACTION FOR SEDUCTION.

By actions for seduction, whether of daughter or other female, damages are in part sought for the injury to the social position and reputation of the plaintiff, through the injury to the reputation of the female. "True enough" says Lowrie, C. J., "the parent is entitled to damages for the disgrace brought upon the family by this stain upon the general good character or reputation of the daughter, but is entitled to damages only for the loss of service, if her previous reputation for chastity was bad, and thus reputation becomes an element of the case."[3] When the seduced female is a mere servant, the damages of the plaintiff, suing as master, would not be affected by the injury to her reputation, "for certainly" says Ross, J., "the misconduct of a mere servant girl could not affect the character of the plaintiff's daughters or bring disgrace upon his family. But, where the seduced is a connection of the plaintiff, (*e. g.*, the sister of his wife, living in his family), such evidence would not only be very properly received, but would be of great importance in assessing damages."[4] Where a relationship exists between the seduced female and the plaintiff, proof of the situation of the plaintiff's fam-

[1] Anderson v. Long, 10 S. & R. 55; Porter v. Seiler, 23 Pa. 424.
[2] American Fire Ins. Co. v. Hazen, 110 Pa. 530.
[3] Hoffman v. Kemerer, 44 Pa. 452.
[4] Wilson v. Sproul, 3 P. & W. 49.

ily, the number of his daughters, their general good character, the family disgrace, etc., can be shown in aggravation of damages.[1]

FORM OF THE PROOF.

The damages are for injury to the reputation. It matters not whether this reputation is better than is deserved or not. Indeed the courts sometimes optimistically say that there is no danger that a reputation will be better than deserved. Nor on the other hand can the reputation be shown to be bad by proof of conduct or special acts. "A person may have a very good reputation in his or her neighborhood, notwithstanding acts of indiscretion or error" or vice. Hence, the daughter whose seduction is the ground of the action, cannot be shown, whether through other witnesses, or by cross-examination of herself, as a witness for the plaintiff, to have had connection with other men.[2] This is a somewhat singular position. The claim of damages to reputation presupposes that the particular fornication of which the defendant has been guilty, has impaired the reputation; but the Courts will not allow proof of prior acts, on the hypothesis that they also impaired it. Nor, in the action for the seduction, is it necessary to prove that the seduction had caused, or to what extent it had caused, a lesion to the reputation, prior to the institution of the litigation. The defendant may show that the reputation of the woman was not good prior to and at the time of the seduction. The Pennsylvania cases do not show what, precisely, the content of this reputation must be. A reputation for being unchaste, would clearly be relevant. Would a reputation for indelicacy of words or acts, immodesty, toleration of liberties with her, by men, not implying sexual coition, be sufficient? Apparently, it is not necessary to show the reputation down to the time and at the place of the seduction. The female may have lived at one place, until a year or two before the seduction, and may have acquired at that place a reputation of being a prostitute. It is competent, probably, for the defendant to put this reputation in evidence, if it comes down to a time sufficiently near to that of the seduction, to justify the inference that it pervades the locality at which the seduction occurred, and colors the opinion of the people there as to the present character of the woman.[3]

PROOF OF GOOD CHARACTER.

The principle is inviolable that the law presumes the character and reputation of the female to have been good, until they are shown to have been bad; and that the plaintiff must be content with this presumption until the reputation has been attacked by the defendant. Until this attack it is error to allow the plaintiff to prove that the female was a person of good

[1] *Id.*

[2] Hoffman v. Kemerer, 44 Pa. 452. In Zitzer v. Merkel, 24 Pa. 408, in contradiction of the testimony of the daughter denying improper conduct with other men, the defendant was allowed, but without objection, to prove that about the time of the seduction she had permitted improper liberties by other men.

[3] Milliken v. Long, 188 Pa. 411. It was shown that while she lived in Pittsburgh her character was bad. She had since resided at Leechburg, where the seduction occurred.

character, and that nothing had been heard against her, until the seduction.[1] And the attack must be by proof of her "general bad character," *i. e.*, of her reputation for unchastity, or looseness. An allegation[2] or an admission by the female, on cross-examination,[3] or proof by other evidence[4] of specific breaches of chastity, or of permitting improper liberties to be taken by men, will not justify the reception of evidence of good reputation. Nor will it justify evidence of good conduct, *e. g.*, that the female has been a modest, prudent woman and of marked propriety from childhood up to the time of the seduction. "If," says Woodward, J., "there be a metaphysical distinction between character and conduct, we know of no authority in law for admitting evidence of conduct where evidence of character would be excluded. * * * * But where any distinction (between conduct and character, and reputation) is taken, it is for the purpose of saying that the evidence must relate to reputation, and not to conduct."[5] After evidence by the defendant of the female's bad reputation, the plaintiff may furnish evidence in contradiction, *i. e.*, that her reputation was good; and if she has lived at two places, and the defendant's testimony is that she had a bad reputation at her former abode, the plaintiff may prove her good reputation at the place where the seduction occurred, and she still resides.[6]

BREACH OF PROMISE OF MARRIAGE.

The sexual character of a party to a contract to marry, is relevant in an action on that contract for breach of it. By character here is not meant reputation but conduct. A woman might conceivably have a bad reputation without deserving it. Her misfortune would probably be no bar to an action by her. But if without the knowledge of the man, that she has been lewd and immoral, he contracts to marry her, his subsequent discovery of this fact will excuse him from performing the contract. The agreement to marry would be binding only if made with knowledge of the facts. "If," says Paxson, J., "he is inveigled into an engagement by a harlot, he is the victim of a sheer, bald fraud. * * * * It is enough to say that the law will not enforce a contract of marriage in favor of a party to it, who is not fit to be married at all. A man is not bound by such a contract, if in ignorance of her true character, he has entered into it with a woman who has earned an evil reputation by a vicious or reckless life."[7] Possibly a divorce from an earlier husband or wife on the ground of adultery, if unknown by the defendant, when he made his promise to marry, would bar the action.[8] Sexually immoral conduct since the making of the promise to marry, on the

[1] Wilson v. Sproul, 3 P. & W. 49.
[2] Wilson v. Sproul, 3 P. & W. 49.
[3] Wilson v. Sproul, 3 P. & W. 49.
[4] Zitzer v. Merkel, 24 Pa. 408; Leckey v. Bloser, 24 Pa. 401.
[5] *Id.*
[6] Milliken v. Long, 188 Pa. 411.
[7] VonStorch v. Griffin, 77 Pa. 504. If the promise to marry was made with knowledge of the past immoral conduct of the promisee, that conduct will not discharge from the promise; Johnson v. Smith, 3 Pittsburg 184.
[8] VonStorch v. Griffin, 71 Pa. 240. It is not decided here whether the immorality of the plaintiff prior to the promise, would be a bar to the action or merely mitigate he damage.

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part of the promisee, unless with the consent of the promisor, will discharge him or her from the promise, but, if with the promisor's consent, will not have that effect.[1] The improper conduct of the defendant since making the contract, not participated in by the plaintiff, may be shown to enhance the damages,[2] and improper conduct, on the part of the plaintiff, though not criminal, if it consists of undue liberties with him or her allowed to others, whereby his or her reputation is degraded, may be shown in mitigation of damages when it would not constitute a bar to the action.[3] From this point of view, the defendant may furnish evidence that since the contract was made, the plaintiff, a woman, committed a gross indiscretion in suffering a man to take liberties with her person.[4] The only evidence in rebuttal of this evidence, would be that which impugned the credibility of the witness who delivered it, or which contradicted it.

But evidence of the general good character and conduct of the plaintiff would not be receivable, to make the truth of this adverse evidence improbable. "True or false," remarks Woodward, J., "his testimony (*i. e.*, of the improper liberties) was not repelled by proof of her general good character. * * * * True, the good character of the party increases the improbability of an alleged crime or gross indiscretion, but it does not disprove it. * * * * Evidence of character never avails against positive and direct proof. It is only in cases where the proof is circumstantial, and grounds of reasonable doubt remain, that character weighs." And yet, the value of the testimony of a witness always rests on his credibility, and the evidence of this is exclusively circumstantial. It consists in the general preponderance of truth-telling over falsehood, in the signs of intelligence, candor, etc., found in the tones, gestures, readiness to respond, etc., of the witness. As, in criminal cases, the good character may overwhelm direct testimony to the criminal facts by impairing its credibility, there is no scientific reason for its not doing so, when the same fact is testified to with a view to deriving civil consequences from it.

FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.

An arrest of a man for a crime produces a suspicion, at least, in the community that he is guilty. It is the publication of the fact that he is suspected by the constable or other person causing the arrest. It is, however, assumed, in Russell v. Shuster,[5] that the plaintiff in an action against the person who made the arrest, does not so put his character in evidence as to entitle the defendant to show that it was bad, in mitigation of damages. Shuster had been arrested by Russell, a constable, without a warrant. Shus-

[1] Johnson v. Smith, 3 Pittsburg 184; Leckey v. Bloser, 24 Pa. 401.
[2] Johnson v. Smith, 3 Pittsburg 184.
[3] Leckey v. Bloser, 24 Pa. 401; Johnson v. Smith, 3 Pittsburg 184.
[4] Leckey v. Bloser, 24 Pa. 401.
[5] 8 W. & S. 308. In Quinn v. Crowwell, 4 Wh. 334, it is said that the character of the plaintiff in an action for malicious prosecution is not in issue, and that it is consequently unassailable by proof of reputation or of particular instances of misconduct. If it appears that the plaintiff had been indicted for a larceny, he may show that he was acquitted of it.

ter's trunk had with his consent been examined, and its contents and his past habits were the principal evidence against him before the mayor who committed him, that he had committed burglary. The plaintiff alleged in his declaration a want of probable cause. This entitled the defendant to show probable cause; and, therefore, to show that the trunk contained, when opened at the time of the arrest, the instruments of a burglar. But, evidence of the character of the plaintiff in mitigation of the damages was properly excluded, says Gibson, C. J., because a "party whose character is not put in issue, is not bound to hold himself in perpetual readiness to defend it; otherwise, it was said (in Jones v. Stevens, 11 Price, 283) 'any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action he should bring to free himself from the effects of malicious slander.'" It is hard to realize, however, if the plaintiff intends to claim compensation for injury to his reputation on account of the arrest, how he fails to understand that the worth of his reputation will be in issue. The offer by the defendant in an action for malicious prosecution and false imprisonment to show that the plaintiff's general character was bad after the complaint had been made before the alderman, to rebut the proof of want of probable cause, was, it was held in Winebiddle v. Porterfield,[1] properly rejected, for the reasons (1) because it could not have induced the action of the defendant, and (2) because it might have been occasioned, in great part at least, by the accusation and incarceration. It was intimated, however, that it might have been offered in mitigation of damages, had the badness of the character been "on subjects unconnected with the charge made by the defendant." If so, it is difficult to understand why the badness of the character, with regard to the traits involved in the matter on which the arrest was founded, before the arrest, would be inadmissible, in mitigation of damages.

LIBEL AND SLANDER.

A slander or libel is a tort which injures or tends to injure reputation, and the action founded upon it seeks to recover compensation for this injury. The character of the plaintiff is therefore in issue in such an action, unless the plea of the defendant excludes it from the issue. The plea of justification confines the defendant to the proof of the truth of his charge, and he is precluded from showing that that character of the plaintiff which the defamation touches, was before the defamation, not good,[2] but, when the plea of "not guilty" is pleaded, either alone[3] or in conjunction, as it may be,[4] with that of justification, the defendant may, for the purpose of mitigating

[1] 9 Pa. 137.

[2] Drown v. Allen, 91 Pa. 393. In Steinman v. McWilliams, 6 Pa. 170, the court refrained from deciding whether, when the plea was "justification" only, the defendant could show that the reputation of the plaintiff had been, generally, bad, but did decide that he could not show that the specific reputation assailed by the slander or libel, *e. g.*, the reputation for truth, for chastity, for honesty, was bad. This case is overthrown by Conroe v. Conroe, 47 Pa. 198, says Moyer v. Moyer, 49 Pa. 210; Drown v. Allen, 91 Pa. 393.

[3] Henry v. Norwood, 4 W. 347; Smith v. Times Pub. Co., 178 Pa. 481; Long v. Brougher, 5 W. 439.

[4] Drown v. Allen, 91 Pa. 393; Smith v. Buckecker, 4 R. 295.

the damages, prove the badness of the plaintiff's reputation, prior to the slander or libel.

PARTICULAR BAD ACTS.

All reputation is or ought to be founded on acts or words. One that is not, is either better or worse than what is deserved. It does not follow, however, that bad acts can be proven by the defendant, in a slander or libel action in order to show what sort of a man the plaintiff has been, or what his reputation is or ought to be. The character evidence must not "descend to particular acts of bad conduct"[1] even were these acts proven by the defendant himself, or by proof of his admissions. In an action of slander for charging the plaintiff with copulation with a beast, it is not proper to prove an admission four or five years ago, by the plaintiff, that he had committed a similar crime on the body of another animal. The objection is not merely that the plaintiff would be unapprised that the attack would be made upon him and unable to defend himself[2] for even had he been informed by a plea, that the attack would be made, it would not be allowed, "so inveterate is the rule," remarks Gibson, C. J., "that character can be impeached but by general evidence of its condition."[3] Informing us that the rule is "inveterate" is scarcely to vindicate it. Perhaps the reason for it is, that a person is entitled to exemption from detraction from his reputation, except by expressions of the truth, though his reputation be undeserved[4] and, to prove the former bad act would not prove that the reputation did not exist, but merely that it was better than it should have been. "Even if a plaintiff," remarks Kennedy, J., "should be guilty of one offense (or two, or twenty) that furnishes no reason or justification for falsely and groundlessly charging him with another, nor ought it to be considered any extenuation of the conduct of a slanderous defendant."[5]

REPUTATION.

The injury which the plaintiff in slander or libel cases complains of, is the "loss of good character," that is, of his reputation for good character. Hence, it is pertinent to the issue to inquire whether he had a good character, for if he did not, he could not lose it by the act of the defendant. The extent of the injury growing out of the libel or slander, would depend in some degree at least, upon the goodness or badness of the general character before the publication of it. The amount of compensation ought to be com-

[1]Taylor Evid. quoted by Read, J., Moyer v. Moyer, 49 Pa. 210; Fitzgerald v. Stewart, 53 Pa. 343.

[2]Henry v. Norwood, 4 W. 347; Long v. Brougher, 5 W. 439. In the former case, Kennedy, J., observes that "although the plaintiff may be considered as having put his general character in issue and therefore bound to sustain it or abide the consequences yet it would be unreasonable to suppose that he could, or to require that he should, come prepared to encounter and refute every act or appearance of indiscretion or crime that might be imputed to him in the whole course of his life, without any previous notice given to him that such charges were intended to be made."

[3]Long v. Brougher, 5 W. 439.

[4]Hoffman v. Kemerer, 44 Pa. 452.

[5]Henry v. Norwood, 4 W. 347.

mensurate with and in proportion to the extent of the injury. Hence, the defendant is permitted to show that the reputation of the defendant was that he was of bad character.

Whether the defendant may show that the character, generally, was bad, which the plaintiff was reputed to have, and whether he may show that the particular character, germane to the imputation in the slander or libel, was reputed to be bad, has been a subject of dispute. The defamation may derogate from the general character, or from some specific character. A may print of B that he was a bad man, not specifying his kind of badness or he might impute to him falsehood, drunkenness, unchastity, fraud, violence. A libel being against a clergyman (what it charged does not appear though apparently, drunkenness was at least one of the imputations) it was held that the defendant should have been allowed to prove that "the general character of the plaintiff was bad." "It was altogether proper for the jury," says Kennedy, J., "who were to assess the amount, to know what standing and character the plaintiff had in society anterior to the publication of the libel."[1] The slander consisting in saying of a woman that she was a whore, the court allowed the defendant to show that "her general reputation (not her general reputation for chastity) was bad."[2]

SPECIALIZING THE CHARACTER.

When the libel or slander has assailed some special department of character, it is permissible for the defendant to show that the reputation of the plaintiff in regard to it, has been bad. In an action for slander in saying that the plaintiff had committed perjury, the defendant could prove in mitigation of damages, the general bad character of the former, for truth and veracity. "So, where the charge is of dishonesty, or immorality, or want of chastity, the evidence in each case would be of a general bad reputation for either of these vices With regard to want of veracity, or lying," says Read, J., it "may be a confirmed habit in persons of otherwise excellent character, as we all of us know of notable examples of men of integrity who are known to be habitual liars. When, therefore, the alleged slander is an accusation of perjury, it seems inevitable that the defense might be a bad general reputation for veracity, while the general reputation for integrity and honesty might be good."[3] Hence the slander being a charge that the plaintiff had, on a specified occasion, perjured himself, evidence should be permitted from the defendant, that the plaintiff's general character for truth and veracity was bad in his neighborhood.[4] The slander imputing being a whore, the plaintiff's bad reputation for chastity, is receivable.[5] "If her

[1]Henry v. Norwood, 4 W. 347.

[2]Conroe v. Conroe, 47 Pa. 198; Smith v. Buckecker, 4 R. 295.

[3]Moyer v. Moyer, 49 Pa. 210. The reasoning in Steinman v. McWilliams, 6 Pa. 170, would make specialization of character improper. It was there held improper, in a suit for slander in charging the plaintiff with an act of perjury, for the defendant to show the plaintiff's bad reputation for truth and veracity. The plea was justification.

[4]Moyer v. Moyer, 49 Pa. 210.

[5]Conroe v. Conroe, 47 Pa. 198. The court below had admitted evidence of bad general character, but not of bad character as to chastity.

reputation for chastity," says Strong, J., "was bad before the slander of the defendant was uttered, can it be said that the injury sustained by her from the wrong of the defendant, is the same as it would have been if her reputation for chastity had been untarnished? * * * * * A man may have many virtues, and consequently a good general reputation, and yet be notorious for a single vice. If his virtues be called in question, it is an injury, but if only his vice be asserted, his injury is less. It is already said that the plaintiff in this case has put her reputation for chastity in issue. Her averment is not that her reputation for all the virtues which go to make up good character was fair, but that her reputation for chastity was sound. And it is that, she complains, has been taken from her. Its real value was therefore a proper subject for inquiry. It would be strange if the defendant may not show it to have been worthless."[1]

EXTENT OF SPECIALIZATION.

To what extent the bad character, put in evidence by the defendant, may be specialized, is an interesting question. When the slander imputes a general class of acts, *e. g.*, of being a thief, of being a prostitute, of being a drunkard, of being a liar, the defendant may doubtless show the reputation of the plaintiff for being such. If the slander imputes one specific act, *e. g.*, that of having stolen a sheep, the defendant may show, not merely the plaintiff's bad reputation for honesty, but reputation for the particular form of dishonesty presupposed in stealing, may be inquired into. It was, in such case, error for the trial court to confine the defendant to the question "What is the general reputation of the plaintiff for honesty?" He should be allowed to ask "What is the general reputation of the plaintiff as to being a thief?" "It was," says Paxton, J., "his reputation for larceny, for stealing, for being a thief, that was in issue. Honesty is a broader term and has a different meaning. It is true stealing may be embraced within it. A thief is always a dishonest man. But the converse of the proposition is not true. A man may be dishonest, and yet not be a thief. A man who does not pay his debts, having the means to do so, or who deals unfairly, may be regarded as dishonest, yet, without more, could not be called a thief. Some of the witnesses in this case testified that the plaintiff's general reputation for honesty was bad, but qualified it by saying "it arose from plaintiff's dealing." It is easy to see how the modification of the form of the question affected the defendant. To all the evidence tending to show that the plaintiff's reputation for honesty was bad, the latter could reply that it was the result of other causes than stealing, that no one had ever charged him with that."[2]

SPECIALIZATION GERMANE TO THE IMPUTED ACT.

As a man may have some virtues and some vices, he has a right to the reputation for the former, despite the latter. If his reputation for the former is injured by the defamation, is it relevant to show that he has the

[1] *Id.*
[2] Drown v. Allen, 91 Pa. 393.

reputation also for the latter? In the absence of evidence on the subject, it would be presumed that his reputation as to all moral traits, was good, but the injury to it would consist in charging the particular vice or vicious act mentioned in the slander or libel. Would the amount of this injury be lessened by the fact that the reputation in other respects was already defective? Does a man without reputation of a single vice suffer a greater loss when a particular vice is falsely imputed to him, than one with a just reputation for one vice and many virtues, when a vice of another class is falsely imputed to him? In Smith v. Buckecker,[1] the slander imputed being a whore to the plaintiff and fornication with two named persons. The defendant was not allowed to show that she was reputed a thief before the utterance of the slander. The justifications for the refusal mentioned by Kennedy, J., are, the evidence could not extenuate the defendant's offense but would be an aggravation of it; and the reputation of being a thief may have been created by the defendant. But, why is not evidence of any bad reputation an aggravation? It is never allowed to extenuate the offense but to show that the damage arising from it is not as great as it would have been, had the reputation been fair. There is always the possibility that the reputation for being a thief, or a prostitute, may have been started by one person, and that that person was the defendant. This possibility has not excluded the defendant's evidence of bad reputation.[2] The real question is, whether imputing vice *a* to a man, who has a reputation of having vice *b* only, inflicts as great a loss upon him, a loss which is entitled to as large a compensation, as it would had he no reputation of vices at all. If it does, it would be irrelevant to show that the plaintiff had vice *b*, but if it does not, it would be relevant to prove the reputation for vice *b*. Another question is whether the answer to the interrogation just propounded, is to be given by the court or by the jury. If by the jury, it could be relevant to admit the proof of the reputation for vice *b;* whereas, if the decision is to be made by the court, and is affirmative, the evidence should be excluded.

PROHIBITED SPECIALIZATION.

Proof of the plaintiff's reputation of having done the particular act ascribed to him by the slander or libel, when it ascribes a particular act is, it seems, not allowable. The slander imputing to a woman fornication, the fact that there had been in "general circulation," before the utterance of the slander, suspicions and reports that she, an unmarried woman, had given birth to a child, could not be employed by the defendant to mitigate the damages, unless the plaintiff himself originated them.[3] The slander consisting in charging the plaintiff with stealing apples on a certain occasion, evidence for the defendant that this imputation was "in general circulation in the neighborhood" is properly excluded. "The general issue only,"

[1] 4 R. 295.

[2] A point against the evidence was also, that it did not show that the plaintiff was "generally reputed" but only that she was "reputed" to be a thief. "She might," says the court, "have been reputed, that is, accounted such, by one or two persons."

[3] Fitzgerald v. Stewart, 53 Pa. 343. The action being by husband and wife for slander of the wife, if the husband told the story to the defendant, in order that she might repeat it, there could be no recovery. Tibbs v. Brown, 2 Grant 39.

says Woodward, C. J., "had been pleaded, and under this, whilst the defendant might assail the general character of the plaintiff, he might not, as I understand our decisions, give evidence of particular reports, not even of the general currency of the particular charge which he took up and endorsed," *i. e.*, repeated.[1] B alleging of A that he, A, had been in the penitentiary of Massachusetts, B, when sued for slander, could not show for the purpose of reducing damages, that a general report had pervaded the neighborhood, before the utterance of the slander, that A had been in the penitentiary of Massachusetts.[2] This evidence is not admissible for any purpose,[3] not to show that the reputation of the plaintiff had already suffered; and not to show that defendant probably believed the charge and was not actuated by the highest degree of malice. If, says Strong, J., the currency of the report was not known to the defendant, it did not show a less degree of malice. "And if it were known, it ought to be regarded no apology for her that others were repeating similar slanders,"[4] and he suggests, as some of his predecessors had done,[5] that the defendant may have been the author of the prior reports.

To the suggestion that the earlier reports of the same charge may have originated with the defendant, it may be replied that they may not have so originated. Although, in the absence of evidence, perhaps the presumption would be convenient that they did originate with him, what would be the attitude of the court, if he furnished evidence that he did not start them? To use the reports as proof of the truth of the fact charged, would not be permissible since proof of reputation cannot be used to prove the specific reputed fact.[6] To the position that the currency of reports could have no bearing on the attitude of the defendant's mind or the degree of malice, the reply may be made that if these reports are believed, there would be less malice in repeating them, than if they were not believed, and if exemplary damages are recoverable in slander or libel[7] it might be important for the

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[1]Lukehart v. Byerly, 53 Pa. 418.

[2]Pease v. Shippen, 80 Pa. 513. *Cf.* Kennedy v. Gregory, 1 Binn. 85; Beehler v. Steever, 2 Wh. 313; Smith v. Stewart, 5 Pa. 372.

[3]Pease v. Shippen, 80 Pa. 513; Lukehart v. Byerly, 53 Pa. 418.

[4]Fitzgerald v. Stewart, 53 Pa. 343.

[5]Kennedy, J., Henry v. Norwood, 4 W. 347; Smith v. Buckecker, 4 R. 295. In Long v. Brougher, 5 W. 439, the defendant offered to prove that long before his slander, reports were in circulation, *i. e.*, told to him, that the plaintiff had done the act which he charged in the slander. Gibson, C. J., seems to admit that the circulation of these reports might be received in "extenuation of malice," but for the fact that there had been a wide interval between the circulation and the slander, and for the further fact that the defendant, sued for an earlier utterance of the same slander, compromised the suit by paying a small sum of money. This was an implied admission that the charge was groundless, and the defendant cannot now recur to the earlier reports, as an apology for his reiteration of the slander, or for the mitigation of the damages.

[6]The defendant in a slander case, proved that the slanderous matter had been told her by the husband of the plaintiff, (the husband was a co-plaintiff), for the purpose of rebutting malice. It was error to allow proof of the bad character of the husband in order to show that the defendant ought not to have believed him. Tibbs v. Brown, 2 Gr. 39

[7]As they are; Clark v. North American Co., 203 Pa. 346.

defendant to negative any special malice by showing his belief in the reports in circulation.[1]

In Long v. Brougher,[2] Gibson, C. J., thus argues against allowing proof of the circulation of the same report as that alleged in the slander which is sued for, in mitigation of damages: "But it surely does not lessen the injury that the plaintiff's character bleeding from a thousand wounds, has received only the finishing blow from the defendant. Who can say that it would not have weathered the storm had it not sunk at last under the accumulated weight of the defendant's wrongs? I am unable to see the justice of estimating character by its fragments, or of treating as matter of extenuation, the fact that the injured party had suffered the same prejudice from another. The blow may fall the heavier on sensibilities morbid from the repetition of injury. * * * * It would be no extenuation of the putting out of an eye that the other had been put out before. * * * * Now it seems to be irreconcilable to the dictates of justice, that previous outrage should have been made an invitation to aggression by cheapening the consequence of it to the perpetrator." It is worth while reflecting how far this logic is consistent with the principle that the object, at least in part, of the action for libel or slander, is to compensate for the injury to reputation, and that an already damaged reputation is not as much hurt either by the imputation of a new vice or the repetition of the charge, already circulating, of a vice, as an unblemished reputation is.[3] If a number of men, successively and without concert, injured the horse of X, until finally one of them administered a blow which killed it, he would hardly be chargeable with the value of the horse as it was before the series of injuries commenced. Each guilty man would be liable for the loss he occasioned, and not for all the losses occasioned by the earlier tort-feasors, as well as by himself. Something could be said for the policy of not allowing any proof of blemished reputation when a defamation, whose truth the defendant is unable to establish, has occurred; but if the principle is to be conceded that the defendant, when he fails to plead and prove the truth of his slander or libel, may show that the reputation of the plaintiff for some trait of character was already bad, it is difficult to realize why he cannot show that there was a general credit more or less strong given to reports that he had done the act alleged against him, before the defendant's utterance of the defamatory statement, provided it is made to appear that he is not responsible for the circulation of these reports.

If it be said that there is this important difference between the cases, that there is no such reason to doubt the justness of the bad reputation, as there is to doubt the justness of the prior editions of the slanderous charge, it may be replied that this difference is illusory. It is unsafe to say, because a defendant does not take the risk of proving the truth of his charge,

[1] In Long v. Brougher, 5 W., Gibson, C. J., intimates a doubt of the opinion of Starkie, that damages in slander cases are given "not to punish, but to compensate."

[2] 5 W. 439.

[3] Conroe v. Conroe, 47 Pa. 198; Henry v. Norwood, 4 W. 347.

that he really, and not fictitiously merely, concedes the untruth of it. He may be able to prove that the derogatory reports had been circulated, and be unable, or think himself unable, to convince a jury of their truth, just as he might be able to prove the derogatory general reputation, though he would despair of being able to prove its correspondence with the actual conduct and character of the plaintiff.

PLAINTIFF'S REBUTTAL OF BAD CHARACTER.

The law presumes the slandered or libelled person to have the ordinarily good character and good reputation. He is not permitted to show that his reputation is better than the ordinary, nor even to show that it is ordinarily good, unless it has been assailed at the trial, by the defendant's evidence that it is bad. This principle obtains, whatever the nature of the defamation which is the ground of action, whether, for example, it charges the plaintiff with being a whore[1] or with having, on an occasion perjured himself,[2] or with having stolen a whip,[3] or with being implicated in a burglary,[4] or with being a robber.[5] When the evidence of the defendant attacks the reputation or character of the plaintiff, the latter may prove that he had a good reputation. Thus, the slander having alleged a perjury and the defendant having, at the trial, given evidence that the character of the plaintiff was not good, the plaintiff should be allowed to show that it was good.[6] The slander accusing of being a robber, after evidence impugning the plaintiff's reputation, he can prove his "general character for honesty."[7] In Chubb v. Gsell,[8] it is decided that when the defendant, though not attacking the plaintiff's reputation, gives evidence, in rebuttal of his own malice, of the circumstances that might have justified his suspicion that the plaintiff had done the act charged, the plaintiff cannot show his reputation, (*e. g.*, for honesty and integrity, the slander having charged the theft of a whip), though the circumstances proven might lead the jury also to suspect that the plaintiff had in fact done the act charged,(the plea being "not guilty"). "His reputation," says Strong, J., "may have been untarnished, and yet the circumstances under which the actionable words were spoken may have been such as to indicate that there was very little malice in the defendant." To describe these circumstances in order to account for defendant's making a charge without malice is not to indicate that the plaintiff's reputation was bad. The circumstances may have been known to none but the defendant. Proof by the defendant, that the charge of the plaintiff's being a whore was made to him by the husband of the plaintiff, (the husband being a co-

[1]Tibbs v. Brown, 2 Grant 39.

[2]Steinman v. McWilliams, 6 Pa. 170.

[3]Chubb v. Gsell, 34 Pa. 114.

[4]Clark v. North American Co., 203 Pa. 346.

[5]Petrie v. Rose, 5 W. & S. 364.

[6]Steinman v. McWilliams, 6 Pa. 170.

[7]Petrie v. Rose, 5 W. & S. 364. This case is disapproved in Chubb v. Gsell, 34 Pa. 114, but, "rather hastily," says Mitchell, J., in Clark v. The North American Co., 203 Pa. 346.

[8]34 Pa. 114.

plaintiff) before he repeated it, does not attack the reputation of the plaintiff so as to justify proof of her good character.[1] The attack on the reputation, however, says Mitchell, J.,[2] may be just as direct and damaging by slurs and insinuations thrown into the jury box, by abuse of cross-examination, as by calling witnesses under a definite offer. In such cases the result is the same, and plaintiff should have the same opportunity to protect himself. How far there has been a direct attack may depend on manner and emphasis, as well as on the words used, and therefore it is a matter to be left largely in the discretion of the trial judge. It is the fact, rather than the manner, of the attack, that entitles the plaintiff to protect himself. In the case just cited, the libel imputing burglary, the plaintiff was called by the defendant for cross-examination. He was asked whether certain stolen goods had not been found in the rear of his house; and how it happened that two of the thieves of city property were his brothers, and were located at the rear of his house, and he, though a watchman, did not know it. He was further asked whether four city papers had not contained a report of the arrest of his brother describing him as "watchman of Starr Garden Park," a position which plaintiff himself held. It was the answers to these questions, says the court, that justified the plaintiff in insisting that he should be allowed to prove that his reputation was good.[3] But, the attack on the reputation which is supposed to justify such proof, has been held to be, not that which affects the opinion of the jury, concerning the plaintiff, but that which shows that the general opinion of the community, prior to the slanderous imputation concerning the character of the plaintiff, was bad. The object of the plaintiff's rebutting evidence, is not to rehabilitate himself with the jury, but to show that his community reputation was not bad, as the defendant represents it, but good. Nothing in the evidence given by the defendant in the case last cited, attacked this community-reputation, unless we adopt the principle that the wide publication of a defamation is itself evidence of the greater or less credence of it by its readers. If the case is authority for the principle that, if the defendant's evidence connects suspicious acts with the plaintiff, so as to impair the confidence of the jury in his character (not in the sense of reputation) he may show his good reputation, it must be regarded as a departure from earlier precedents. The good reputation of a man would be substantially used to prevent the jury's believing certain imputed acts, or to prevent its drawing discreditable inferences from these acts; a use not warranted by the earlier cases.

ACTION BY MOTHER FOR SON'S WAGES.

The act of May 4th, 1855,[4] gives to the mother, when the father, from drunkenness, profligacy or other cause, neglects or refuses to provide for his child or children, all the rights of a father; "Provided always that she shall

[1] Tibbs v. Brown, 2 Grant 39.
[2] Clark v. North American Co., 203 Pa. 346.
[3] The plaintiff ought also, says the court, to be allowed to show that he had a trade and worked at it honestly.
[4] P. L. 430; 1 P. & L. 1506, 2902.

afford them a good example and properly educate and maintain them according to her ability, *and provided* That if the mother be of unsuitable character to be intrusted as aforesaid, or dead, the proper court may appoint a guardian of such children," etc. An action by her, under the statute, for the wages of a son thirteen years old, puts in issue her character. It will be presumed good, until shown to be bad. In Eustice v. Plymouth Coal Co.,[1] her bad reputation for chastity was proven, apparently as evidence of the *fact* of unchastity, for it can scarcely be held that a woman actually chaste should be denied the benefit of this statute, because unfortunately she had an untrue reputation. She also stated, on cross-examination, that she had had a man arrested for adultery with her. She was denied the right to recover. To what extent under this act may the woman be surprised with proof of specific bad acts? If a bad reputation is not *ipso facto* a forfeiture of the rights conferred by the statute, and it may be used merely as proof of bad character, *i, e.*, of bad conduct, it is a very exceptional case. Proof of bad reputation is generally receivable only when the reputation itself is the basis of a right; not when conduct is the basis of the right and in order to prove the conduct.

PROVING CARE.

If a right to recover against A rests on the presence or absence of habitual carefulness in B, the absence of this carefulness can be proven by reputation, and not by special acts of carelessness. In an action by A against an employer for an injury arising from the negligent act of B, a fellow employee, the defendant is liable only if B had been habitually negligent, prior to the time of the hurt. That he had been, could not be proven by his having had several collisions, and his having been fined for them by his employer, a railroad company, on the ground that they were due to his carelessness. The character for care, can be proven only by the reputation for it, and not by special acts. "Character grows out of special acts, but is not proved by them." Careful men sometimes commit careless acts. Particular acts of error sometimes lead to great improvement. Special acts very often indicate frailties or vices that are altogether contrary to the character actually established. This, then, is an instance in which the reputation is accepted as proof of actual habitual conduct or character.[2]

WHEN FALSE REPORT OF CHARACTER IS A FRAUD.

The representation of X's character may be made to A in order to induce him to do something, *e. g.*, to make a devise, or to omit to make one. When the act can be set aside because of the falseness of this representation, evidence of the actual character of X may be given. Thus, a will having pretermitted a son, it may be shown that the will was procured by a representation to the testator that the wife of this son was an extravagant woman, keeping liquors, and giving parties, "as bad a woman as any in

[1] 120 Pa. 299.
[2] Frazier v. Pennsylvania R. R. Co., 38 Pa. 104.

Lancaster;" who would dissipate anything that might be given to her husband. In a controversy *devisavit vel non*, the opponents of the will may show, that the son's wife had a general good character and behaviour.[1] Whether the evidence was by those who knew her, that her conduct was good, or whether it was of a reputation she had, is not clear. It is described as "evidence of general character," but the court remarks, "of conduct such as this she had been accused to the testator, and the defendants ought to have had an opportunity of proving the accusation false by showing she had behaved herself well." In another case,[2] a testator was induced to pass his children by and give all his estate to three women. At the trial of the issue, it was proven that these women had represented each other to him to be persons of virtue and good character, and thus induced him to make them legatees. It was competent to show that they were women of bad character. "Under these circumstances," says Tilghman, C. J., "I have no doubt that the evidence was admissible, because it had a tendency to prove that the testator had been deceived by falsehood." It does not appear whether the evidence was of persons who knew the women, and testified to their character as they knew it, or of persons who testified to their reputations; probably the former.

WILLIAM TRICKETT.

[1] Dietrick v. Dietrick, 5 S. & R. 207.
[2] Nussear v. Arnold, 13 S. & R. 325.

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BOOK REVIEWS.

We have before us the two volumes of the second edition of Abbott's Trial Brief, dealing with the subject of pleadings in civil actions.

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These volumes will doubtless meet with the same success as the earlier books of the series.

MOOT COURT.

IN RE ESTATE OF DONALDSON.

Active and passive trusts defined—Passive trusts not sanctioned by the law—Trustee may be compelled to join in a conveyance by the cestui que trust—Doctrine of accumulations.

STATEMENT OF THE CASE.

Samuel Donaldson left by his will, a farm to Peter Davis, to hold in trust for his only two sons, Alfred and James, until they should be forty years of age, and then to convey to the two sons or the survivor of them. When the youngest was thirty years of age, the two sons conveyed to James Dill, and this suit is to compel the trustee to join in the conveyance.

AMERMAN and HOUCK for the complainant.

The period of survivorship is to be taken as the death of the testator unless a contrary intent is apparent. Shellcross's Estate, 200 Pa. 122; Johnston v. Morton, 37 Pa. 377; Woelpees' Appeal, 126 Pa. 562; Grimm's Appeal, 37 Pa. 9.

The estate vested in the sons upon their majority; for to continue the trust longer would have been contrary to the Act of April 18, 1853, forbidding trusts for accumulations. Shellcross's Estate *supra;* Act of April 18, 1853, P. & L. 4055; Washington's Estate, 75 Pa. 102.

BENJAMIN and YOCUM for the respondent.

The testator has expressed his intention that the trust shall continue until each shall arrive at the age of forty years. It is an active trust in the nature of a spendthrift trust, and cannot be executed during this period declared for its execution. Kelley's Estate, 193 Pa. 45.

The intention of the testator as clearly expressed in the will, that the word survivor should relate to the death of the children and not his own death. Arnold v. Jack, 24 Pa. 57; Keet v. Demer, 66 Pa. 326; Jones v. Cable, 114 Pa. 586.

OPINION OF THE COURT.

In deciding this case there are several different points that should be discussed separately. First, as to whether this is an active or passive trust; if an active, then perhaps it would be legal and should be sustained; if passive, it is void after the *cestuis que trustents* have reached their majority, as being in restraint of alienation. Second, is it a trust for accumulation?

Before deciding the first point we must find out just what an active and passive trust are, and what they stand for in the eyes of the law. An active trust is one, according to the authorities, where the trustee has certain discretionary duties to perform; such as the collection of rents and profits and the investment of the trust funds. A passive trust is one in which the trustee has no active or discretionary duties to perform, but merely holds the title for the benefit of the *cestui que trust.* Such a trust under the law would be void and executed for the benefit of the *cestui que trust.* Kunkle's Estate, 8 Dist. 615. In this case the trust is created merely to postpone the vesting of an interest in the estate, and it would therefore be void and executed. McCune v. Baker, 155 Pa. 503; Kunkle's Estate, *supra.*

Further, we find that the trustee is directed to convey the estate to the beneficiaries when they, or the survivor of them, reaches the age of forty years. This direction is of no consequence. A trust to convey, under the laws of Pennsylvania, is executed and the legal estate vested without any conveyance. Lare's Estate, 8 Dist. 265; Chamberlain v. Maynes, 180 Pa. 39; Bacon's Appeal, 7 Smith, 504. Moreover, such a trust ceases when each child reaches majority, inasmuch as the law after then does not permit any restraint upon absolute ownership. Gray on Perpetuities, 102; Shellcross's Estate, 9 Dist. 388; S. C., 200 Pa. 122.

Allowing that this is an active trust, the *cestuis que trustent* all being *sui juris* and the beneficial owners of the property could waive the trust for conveying at a future time and agree to an immediate conveyance. Henderson's Estate, 39 L. I. 450.

It has been argued that this is a case to which the doctrine of accumulation applies, and hence the Act of April 18, 1853, P. L. 503, which declares that all such trusts are void upon the beneficiary reaching majority. But we think from the imperfect statement of the facts that this does not apply, for there is no direction to the trustee to hold and collect the rents and profits until the sons reach the age of forty years, but merely to hold the legal title and at the time specified make conveyance of the said title to them.

The rule seems to be that wherever the rights of a remainderman would not be interfered with, the trust will be executed. Now, we think that this should be done in this case, and as the counsel for the complainants have asked the court to make a decree compelling the trustee to join in the conveyance, we think that it should be made following the ruling in Kay v. Scates, 37 Pa. 31, viz: When the nominal trust beclouds the title and embarrasses the right of alienation, a conveyance will be decreed in accordance with the practice of the courts of chancery.

Conveyance decreed.

JAMES, J.

OPINION OF THE SUPREME COURT.

The farm was devised to Davis in trust for the two sons of the testator until they should attain the age of 40 years. But it was not then to be conveyed to them unconditionally. If one should have died before the other, before both had reached that age, the land was to be conveyed to the survivor. They had, therefore, contingent cross-remainders. If both died before reaching the age of 40 years, no conveyance was to be made. The gift of the remainder to the survivor was therefore not absolute. It was conditional on his becoming 40 years old. If he did not, the testator was intestate as to the residue.

It is true that there is no explicit definition of duties to be performed by the trustee. There are cases which hold that the trust will nevertheless be valid, if there are contingent remainders, or other interests, given to other persons than the *cestui que trust.* Perhaps the limitation of the remainder implies active duties, meanwhile, though they are not formally expressed. Ingersoll's Appeal, 86 Pa. 240. One of the points made in McCune v. Baker, 155 Pa. 503, is that, "the trust was dry," and, there was an "*absence of a gift over.*" Harmony in the decisions is not to be looked for, and

there are cases *contra*, *e.g.*, Phila. Trust, Safe Dep. &c., Co.'s Appeal, 93 Pa. 209.

There is no prohibition against the *cestuis que* trust aliening their interests, as such to a stranger, nor against their aliening the contingent remainders to the same stranger. If they had done so, it could scarcely be contended that the trust would still have any useful purpose. It could not have been the testator's intention to make a trust for a stranger. Nor, is it to be believed that he intended the trust for the benefit of his heirs. The *cestuis que trust* having conveyed to Dill, have passed to him their interest in the trust, and their cross-remainders. The court has properly concluded that the trustee should make a conveyance of his title to Dill.

Appeal dismissed.

JAMES vs. DOBSON.

Assumpsit—Contract of suretyship—Surety cannot be held liable on a parol promise to discharge the debt of another—Act of April 26, 1855.

STATEMENT OF THE CASE.

William Brown applied to Peter James for a loan of one thousand dollars, and stated that he would give William Dobson as his surety. Subsequently, James saw Dobson and stated to him what Brown had told him. Dobson replied that he should make the loan and he would sign the note of Brown as a surety. The loan was made on the faith of the promise made by Dobson to become surety, and a note taken by James from Brown dated April 1, 1902, and payable to him on April 1, 1903, with interest from date. On July 1, 1902, James presented the note to Dobson and requested him to sign as surety, which he refused. At maturity of note Brown had become insolvent and James sues Dobson for the amount due on the note. These facts being agreed upon the plaintiff asks for judgment.

BRADDOCK and HEDGES for the plaintiff.

The contract was with Dobson primarily, and he is liable. This removes it from the statute of frauds. Clark on Contracts, page 95.

If a person says I will see that you are paid, it is not within the statute of frauds. Nelson v. Burton, 3 Met. 396; Zaston v. Farr, 148 Pa. 220.

LAUB and SETZER for defendant.

A contract of suretyship must be in writing. Wilson v. Martin, 74 Pa. 159.

The Act of April 26, 1855, forbids the admission of parol evidence to prove a contract of surety. Schaefer v. Bank, 59 Pa. 144; Murray v. McKee, 60 Pa. 35.

A parol promise to indorse the note of another is within the statute. Der v. Downs, 57 Iowa 589; Carville v. Crane, 5 Hill 484; Miller v. Long, 45 Pa. 350.

OPINION OF THE COURT.

Under the Act of April 26, 1855, P. & L. 308, par. 1, providing that: "No action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action should be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized;" I do not think that the plaintiff can recover in this action.

Construing the statute strictly I would contend that when a party promises to act as surety without any written agreement, he cannot be held liable, and the contract will not be enforceable.

A parol contract of guarantee that a third party will pay his note is not enforceable. Miller v. Long, 45 Pa. 350; Jack v. Morrison, 48 Pa. 113; Allwine v. Garberick, 8 Phila. 637.

An indorsement is not such a note in writing as is required by the statute, and proof of a collateral liability for the debt of the maker, different from that which the indorsement imports, cannot be made by parol. Murray v. McKee, 60 Pa. 35; Schafer v. Farmers' and Mechanics' Bank of Easton, 59 Pa. 144; Slack v. Kirk, 67 Pa. 380; Eilbert v. Finkheimer, 68 Pa. 243.

When the validity of a contract depends upon its being in writing, it can be proved only by writing. Miller v. Fichthorn, 31 Pa. 252; Martin v. Duffey, 4 Phila. 75; Kelley v. Watson, 1 W. N. C. 6.

A verbal promise by an executor to pay a legacy, or on the mere consideration of assets, does not make him personally liable.

Okison's Appeal, 59 Pa. 99; Smith v. Carroll, 112 Pa. 390.

This statute has been copied from the English Statute of Frauds and Perjuries, and has long since vindicated itself as a salutary rule of law. To take away this temptation to perjury, he who is sued for the debt of another, has a right to demand written evidence of his promise.

In the case of Dee v. Downs, 57 Iowa 589, which is directly to the point, it was held that where one agreed to execute a note as surety for another, such an agreement is a promise to answer for the debt or default of that other, and is within the Statute of Frauds unless the agreement is in writing.

De Colyer's Law of Guaranties, Principal and Surety, page 39, in referring to operation of the Statute of Frauds, says: "That it is obvious that a promise to give a guarantee at a future time entirely falls within the mischief which the enactment was intended to guard against, and indeed, that if the statute could be avoided by making such a promise it *would be useless.*"

In the case at bar the claim being for the debt of another, the defendant having not signed, nor directed any one to sign as is required by the Statute of Frauds, he is not liable. There is no promise in writing by Dobson, and, therefore, no promissory note by him, and no valid promise to pay the debt of another, and consequently judgment must be rendered in favor of the defendant.

CARLIN, J.

OPINION OF THE SUPREME COURT.

Dobson told James that if he made the loan to Brown, he, Dobson, "would sign the note of Brown as a surety." He did not borrow the money himself and direct it to be paid to Brown. Nor did he affect to borrow it as a joint principal with Brown. James understood him to promise, and he in fact promised, to become surety by signing the note

If he had said that he would be surety if the money was loaned, the statute of frauds would make the assumption unenforcible. Surely no greater effect can be attributed to an oral promise to become surety by signing the note.

It is true that James was beguiled into parting with his money by Dobson's promise, and that it is very like a fraud for Dobson now to repudiate his promise. But the law chooses between more and fewer frauds, and between frauds on the alleged creditor and frauds on the alleged collateral debtor. The English parliament and the legislatures of various American states have deemed it preferable to endure frauds of persons offering orally to become sureties, than to endure frauds of creditors, alleging that they become such in reliance on oral proffers from sureties. It is unavoidable that the statute designed to prevent one set of frauds should make another set possible.

Judgment affirmed.

ESTATE OF SAMUEL TALIAFERO.

Executor's liability on investment of trust funds—Duty on cestui que trust to elect to take profits of investment or interest.

STATEMENT OF THE CASE.

John Pope, executor, whose duty it was to invest the personalty ($20,000) used it in a business of his own. For four years the profits he made on the money represented by his business was nine per cent. The next three years it was seven per cent. The next five years it was but two per cent., and the two following years there was a loss of twelve per cent. on the capital invested. Pope filed an account.

The *cestui que trust* claimed that he should be surcharged with the percentage got by him the first seven years and with six per cent. on the $20,000 for the other years.

The trustee contends that he should account for six per cent. for all the years, or for the average profits of all the years.

SETZER attorney for exceptants.

Where a trustee speculates with trust funds in his own business he may be held for profits if successful, and interest if the investment is disastrous. Norris' Appeal, 71 Pa. 106; Deal's Estate, 18 Phila. 188; Thompson's Estate, 18 Phila. 63; Robinet's Appeal, 12 Casey 174; Williamson's Estate, 18 W. N. C. 138; Ishmen's Appeal, 43 Pa. 431.

Executor must pay legal interest on trust funds. Act Mar. 29, 1832; Verner's Estate, 6 Watts 250; Dyott's Estate, 2 W. & S. 505; Whitaker v. Peek, 4 Kulp 320.

MENGES attorney for executor.

Interest chargeable to the executor shall

not exceed the legal rate. Act Mar. 29, 1832; Heckert's Appeal, 24 Pa. 482; Com. v. Lintner, 8 Lanc. Bar 25.

The *cestui* trust may accept either profits or interest but not both. Robinett's Appeal, 36 Pa. 174; Gilbert's Appeal, 78 Pa. 226; Segurn's Appeal, 103 Pa. 139; Small's Estate, 144 Pa. 293; Sharp's Estate, 2 Phila. 280.

OPINION OF THE COURT.

The first question in this case is: In what may a trustee invest trust funds in order that he may not be held liable in case of failure?

In Pennsylvania, by statute, he may make such investment in the public debt of the U. S., of the State, of Philadelphia, in real securities, county bonds, city bonds, and in school district or municipal bonds. Act of 1876, P. & L. C. 3334, and by Act of 1854, in ground rents; by the Act of 1870, in bonds of the Pa. R. R., and by Act of 1872 the same privilege was extended to investments in bonds of the P. & R. The executor may, however, be authorized by the testator to invest in other securities, but he, the executor, must establish such authority with the utmost clearness, Barker's Est., 159 Pa. 528. And, in Pennsylvania unless there be a discretionary authority as to the investment of trust funds even the legislature cannot authorize such investment in the bonds or stock of a private corporation. Constitution of 1874, art. III, sec. XXII.

The authority to invest the trust funds in personal security was not authorized by statute and it does not appear that he was given such authority by the testator, and where neither appears the executor must bear the loss for such investment. Angue's Estate, 2 Phila. 137; Baker's Appeal, 18 Pa. 303.

The next question is, must the executor account for the profits? Pope, the executor, contends that he may pay interest and retain the profits, or that he may turn over the profits and be exempt from the payment of any interest. The money on which Pope, as executor, made a profit for the first seven years belonged to the *cestui que trust* and we do not see how the executor can use the trust funds in an investment not expressly authorized by testator or not sanctioned by statute, and then claim the profits. The executor, as trustee, holds the legal title for the use of the *cestui que trust*, and when there are profits or accretions the legal title to such vests in the trustee for the use of the *cestui que trust*. He being the bare custodian of such fund for another we think he must account for the profits. Habeman's Appeal, 111 Pa. 329; Norris' Appeal, 71 Pa. 106; Hermstead's Appeal, 60 Pa. 423; Baker's Appeal, 120 Pa. 33; Kepler & Davis, 80 Pa. 153; Oswald's Appeal, 3 Grant 300.

The next question is, did the trustee use sufficient care and prudence in making the investment to exempt him from the payment of interest for the five years in which the investment was disastrous?

When the trustee invests in a manner unauthorized by statute or the testator, no matter how good his intentions were; he is liable to removal, interest on the fund, to make good the principal lost and to a criminal prosecution for embezzlement. Drake's Est., 2 Kulp 256.

The simple fact that he acted in good faith and that other prudent investors have bought the same securities is immaterial. Ishmen's Appeal, 43 Pa. 431; Barker's Appeal, 159 Pa. 518.

In view of the law as stated we think Pope, the executor, should turn over the profits to the *cestui que trust* and pay interest at 6 per cent. for the unsuccessful years.

FOX, J.

OPINION OF THE SUPREME COURT.

The learned court below has properly decided that the executor had no right to invest the trust money in his business. He has, however, done so. The question is, what should he pay, profits or interest; and further, can he be compelled to pay profits for the years during which profits were earned, and interest for the years during which profits equal to six per cent. were not earned? The option is with the *cestui que trust*, to demand the profits or the interest. He will, on the settlement of the account, ascertain which of them it would be to his advantage to claim. But, why should profits for one period and interest for another, be claimable? By demanding the profits, the *cestui que trust* ratifies the investment, as a unit, and precludes himself from repudiating it for a portion of the period. If great profits were made for two months, and then heavy losses for the remaining ten months of a

year, could the profits for the former period and the interest for the latter be demanded? But the distinction of months is no more arbitrary than that of years. It will scarcely be contended that if the result of a year's operations is a profit of only two per cent. the *cestui que trust* could claim six per cent. on his fund for the ten months during which there was a loss, and at the same time claim 15 or 20 per cent. profit during the six weeks or two months of the year during which such profits were made. The exceptant should have considered the product of the investment as a totality, and, finding the interest on the fund, at six per cent. for 14 years, to be greater than the average profits for the 14 years, he should have elected to take interest. He cannot divide the period of investment into two portions, that in which the profits exceed six per cent. and that in which they are less than six per cent. and elect to take the profits for the former and the interest for the latter. Small's Estate, 144 Pa. 293; Sharp's Estate, 2 Phila. 280; Guardians, 239.

Decree reversed with *procedendo*.

DAY vs. LOGAN.

Bankruptcy—National bankruptcy act 1898—Preference—Knowledge of insolvency—Affidavit of defense—Sec. 60 (a) and (b) construed.

STATEMENT OF THE CASE.

Logan, a creditor of John Jiller, obtained judgment, issued execution and collected the debt, viz: $1,000. Two months after the execution sale Jiller petitioned in bankruptcy. He was in due course adjudged a bankrupt. Day was appointed trustee. He sues Logan to recover the value of the goods taken in execution which was $1,150. If he cannot recover this, he wishes to recover $1,000, the price at which they sold. The evidence shows that Logan knew when he got his judgment that Jiller was insolvent; that Jiller likewise knew it; that Logan intended to prefer himself to other creditors, he obtained judgment, knowing that the other creditors would not obtain judgment of their claims.

HUBLER for plaintiff.

Cited Section 60, Clause *a* and *b*, of the Federal Bankruptcy Act of 1898.

The defendant had reasonable cause to believe the judgment was intended as a preference. Toof v. Martin, 13 Wall. (U. S.) 40; Buchanan v. Smith, 16 id. 277; Wager v. Hall, id. 584; Merchants' Nat. Bank v. Cook, 95 U. S. 342; Mundo v. Shepard *et al*, 166 Mass. 323.

LOURIMER for defendant.

Lack of knowledge upon the part of the defendant of the insolvency of the bankrupt, and reasonable cause to believe the transaction was not intended to create a preference, is a good defense. Gamble v. Elkin, 205 Pa. 226; cited also Furth v. Stahl, 205 Pa. 439; Trust Company v. Roebling, 107 Fed. Rep. 71.

OPINION OF THE COURT.

Logan, a creditor of Jiller, obtained a judgment against the latter, issued execution, and collected his debt. Two months afterward Jiller filed a petition in bankrupty, was adjudged a bankrupt, and the plaintiff, Day, appointed trustee. Proceedings were instituted by Day, alleging that the judgment was a preference, and voidable by action of the trustee, because it was in violation of Section 60, *a* and *b*, of the National Bankruptcy Act, which reads as follows:

"*a*. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * * procured or suffered a judgment to be entered against himself in favor of any person * * * * and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

"*b*. If a bankrupt shall have given a preference, and the person receiving it * * * * shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property, or its value, from such person."

The testimony adduced at the trial of the case showed that both the defendant and the bankrupt knew of the latter's insolvency, and that Logan, the defendant, also intended to prefer himself to other creditors.

There can be no dispute but that the facts bring the case within the meaning of Section 60, subd. *a*, of the act. But whether

or not it is within the purview of subd. *b* of the same section is very doubtful.

This subdivision provides that the trustee may recover "*if the person receiving it* (*preference*) *shall have had reasonable cause to believe it was intended thereby to give a preference.*"

What is the true meaning of this phrase in the act?

Necessarily it presupposes an intention on the part of the insolvent, together with acts sufficient, that the party preferred may be charged with having reasonable cause to believe a preference was intended.

Applying these principles to the case at bar, what do we find? Logan knew that Jiller was insolvent. Knowledge of one's insolvency, unless accompanied by a positive act on the part of the insolvent, is not evidence sufficient to charge a person with having reasonable cause to believe a preference was intended. The requirement of the bankruptcy law is not that the preferred person should have reasonable cause to believe that the bankrupt was insolvent, but that a preference was intended. Crawford, trustee, v. Rumpf, 205 Pa. 154. A person may be insolvent and yet not have an intention to prefer a certain creditor when an adverse judgment is entered against him. He may have exactly the opposite intention. For these reasons we believe bare knowledge of Jiller's insolvency does not bring the defendant within the meaning of subdivision *b*, section 60.

Neither do we think Jiller's consciousness of his embarrassed condition, nor Logan's intention to prefer himself, affect the determination of the case.

The essential point is, whether Logan had reasonable cause to believe a preference was intended.

The law presumes that transactions of this character are legal, and the burden of proof is on the trustee to overcome this presumption. Keith v. Gettysburg Nat. Bank, 23 Sup. 14; Netter v. Refwirch, 12 Dist. 196. The trustee must show some positive act on the part of the insolvent which would induce the ordinary man to believe a preference was intended. A very slight affirmative act would be sufficient, such as facilitating the entry of a judgment, etc. Whether or not Jiller resisted the entry of the judgment does not appear. But assuming that he had no defence, and remained passively indifferent, would this be sufficient? We think not. He owed a just debt, he had no defence, and he made none. To have made an effort by dilatory or false pleas to delay judgment would not only have been a moral wrong, but a fraud in law. And the law would not sanction it, much less compel it.

Again, it is argued that a legal duty is imposed on an insolvent, when sued by a creditor in a proceeding likely to end in judgment and seizure of property, to file himself a voluntary petition in bankruptcy, and that failure to so do implies an intent to prefer. No statute places this duty on an insolvent, and certainly there is no moral obligation on his part to so do. Many business men find themselves technically insolvent, yet by the forbearance of creditors, and by energetic action, are able to again place themselves on a solid financial basis. Under the Bankruptcy Act a person is deemed insolvent when his debts exceed the aggregate of his property. A very serious injustice would be worked if it were held that a person against whom a judgment was entered, and whose debts exceeded his assets, however little, incurred a legal or moral duty to go into bankruptcy. Suppose a merchant discovers that the aggregate of his property at a fair valuation is less by $5.00 than the amount of his liabilities. The following day a judgment is recovered against him for $5.00. He is, according to the act, insolvent. And, if the above theory be correct, it would be his duty to immediately file a voluntary petition in bankruptcy, and have all his property taken from him, when if given a little time he would have been able to meet all his debts. We think the argument is without foundation.

We therefore reach the conclusion that the insolvency of Jiller, known to both himself and Logan, together with the fact that Logan, in obtaining judgment, intended to prefer himself to other creditors, is insufficient to charge the defendant with having reasonable cause to believe a preference was intended, and further, that it is insufficient to submit to the jury. Keith v. Gettysburg National Bank, 23 Sup. 14.

We therefore direct the jury to render a verdict in favor of the defendant.

PAUL WILLIS, J.

OPINION OF THE SUPREME COURT.

This is an action by the trustee in bankruptcy, to recover money collected by an execution. The judgment was obtained (*in invitum*, we must assume), when Jiller, the defendant, was insolvent, and when both Logan, the plaintiff, and he knew that he was insolvent. Logan and Jiller knew that there were other creditors; the former intended to prefer himself to them, both when he obtained the judgment and when he caused the sale.

The obtaining of the judgment and the issue of the execution, Jiller not having at least five days before the sale, vacated or discharged the preference secured by them, was an act of bankruptcy. The defendant "suffers or permits" the creditor to obtain a preference, when, without any co-operation of his, the judgment is obtained and the execution issued. In Wilson v. Nelson, 183 U. S. 191, a warrant of attorney was given in 1885, thirteen years before the passage of the Bankrupt Act of 1898. Judgment was entered on it Nov. 21, 1898, without any co-operation of the defendant. When the warrant was given, he was solvent. He had become insolvent. He could do nothing to prevent, and he did nothing to induce or assist the plaintiff to enter the judgment. It was held, however, that the entry of the judgment, etc., was a suffering or permitting, while the debtor was insolvent, the creditor to obtain a preference, and was an act of bankruptcy, under the third section of chapter III of the bankrupt act.

The 60th section of this act states that a person shall be deemed to have given a preference, if being insolvent he has, within four months before the filing of the petition * * * procured or suffered a judgment to be entered against himself * * * and the effect of such judgment * * will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. "Suffer," in this clause, can scarcely mean other than it means in section 3.

Section 60 provides for the avoidance of the preference. It is necessary in order to avoid it, that the person receiving it * * * "shall have had reasonable cause to believe that it was intended thereby to give a preference."

An act may be one which justifies the sequestration of the debtors property; that is, it may be an act of bankruptcy, although the effect of the act with respect to another person, will not be annulled. Peck v. Connell, 21 Super 22. The mere passive or active suffering the recovery of a judgment may be sufficient to support proceedings in bankruptcy, although the plaintiff therein may not be deprived of the judgment, or of the payment of his debt, effected by means of an execution based upon it. Though, by section 3, the recovery of the judgment is alone an act of bankruptcy, there must in addition be an intent to give a preference, and reasonable cause for the creditor's believing in the existence of this intention, in order to justify the deprivation of the creditor of the fruits of the judgment and execution.

Literally interpreted, the 60th section seems to require an intention in the debtor to give a preference, and reasonable cause for the creditor's believing in the existence of this intention. We are of opinion that this strict interpretation is not to be made. The question is, shall the creditor lose an advantage? His own intention would seem to be more relevant than that of the debtor. If *he* has the intention to take a preference, and if he, in fact, takes it, why should he be allowed to retain it, because the debtor did not intend it? Is it not as reprehensible for the creditor to intend to take a preference, as for the debtor to give one? And will not preference be procured in a large number of cases, no less in consequence of the intention of the creditor than of the debtor? The 60th section evidently contemplates that the mere existence of the debtor's intention shall not be enough to render voidable the preference. The creditor's participation in it is contemplated by the condition that the creditor shall "have reasonable cause to believe" it. His belief is inferred from his having had reasonable cause to believe. The intention of the debtor alone, then, does not imperil the preference. Conjoined with it, must be that of the creditor, for if the creditor believes that the debtor intends to prefer him, the creditor must intend, in accepting it, the same preference that the debtor intends. There is no visible reason while annulling a preference intended by both parties, for not annul-

ling a preference intended only by the party who gains it.

But, the preference is gained, not barely by the entry of the judgment, but by its being allowed to stand; by the execution that issues on it, and the sale that is effected under it. Does not the debtor, knowing that the creditor has obtained the judgment, and that a preference must result from it, intend this preference when he refrains from causing it to be "vacated or discharged" at least five days before the sale? If he can vacate it in no other way, he can do it by resorting to voluntary bankruptcy. Remarking that the debtor did not, within five days before the sale, vacate or discharge the preference, "or file a petition in bankruptcy," Gray, J., observes in Wilson v. Nelson, 183 U. S. 191: "By failing to do so, he confessed that he was hopelessly insolvent, and *consented* to the preference that he failed to vacate." When one "consents" to a preference which he can avoid he is not far from "intending" it.

We are of the opinion that from the facts disclosed in the court below, it is sufficiently evident that Jiller was insolvent when the judgment was recovered, that he in suffering that judgment to be recovered, or in suffering his property to remain accessible to executions issued upon it, intended that Logan should be paid before other creditors, that Logan not only had "reasonable cause to believe" but did believe that this was his intention, and that the preference is therefore voidable. Peck v. Connell, 21 Super 22, is not distinctly *contra*.

The goods levied on were worth $1,150. They sold at the execution sale for only $1,000. The title of the purchaser cannot be assailed. It does not appear that Logan became the purchaser. The recovery allowed by the 60th section of the act of 1898 is of "the property or its value from such person," that is, from Logan. No recourse can be had to the sheriff's vendee if he is other than Logan. The trustee is entitled to recover the "value" of the property. In the absence of other evidence, the price obtained at a judicial sale will be assumed to represent the "value" of the things sold, but as experience abundantly shows, it may be in fact much less. It is affirmatively found in the court below, that the value of the goods sold was $150 more than the price secured. The accepting and enforcing a preference was improper, and there is no hardship in obliging the creditor to replace what he has caused to be sold or its value, *i. e.*, what the trustee could obtain from it, did he find it among the assets. What the inferiority of the price obtained at the execution sale to the value, was due to, does not appear. We cannot assume that the price at a trustee sale would have been equally inferior to the actual value.

Despite the clear and forcible opinion of the learned court below, by which its judgment is fortified, we find it necessary to come to a different conclusion. Judgment reversed with *v. f. d. n.*

PENNA. COAL CO. vs. TROY R. R. COMPANY.

Corporations—Ultra vires contracts—A creditor entering an ultra vires contract knowingly and which was executed in whole or in part may enforce it against the corporation—Such a debt is to rank as any other debt in the distribution of the funds of an insolvent corporation.

STATEMENT OF THE CASE.

The Troy R. R. Company was chartered to carry passengers and freight. In order to increase the business of the corporations it entered into a contract by which it leased iron mines and a furnace, and operated the same. It purchased for fuel for this purpose 1,000 tons of anthracite coal from the Penn. Coal Co. for $4,000, who was aware of what it was to be used for. The operation of the furnance proved a losing operation, and not enough was realized to pay the necessary outlay. The railroad company became insolvent, its property was sold under judicial proceedings. The amount realized for the same was $200,000. The indebtedness for equipment, cars, engines, rails, ties and operating expenses amounts to $210,000. The Penn. Coal Co. claim to participate in the distribution of the fund, which is resisted by the creditors to whom the moneys are due for cars, etc. Shall the auditor allow a pro rata to its claim, or distribute the whole fund to the others?

MOREHOUSE for plaintiff.

A corporation may not avail itself of the defense of *ultra vires* when a contract has been executed by the other party. Schurr v. N. Y. Investment Co., 18 N. Y. Supp. 454. Such a contract is enforceable where plaintiff has performed. Oil Co. v. Transportation Co., 83 Pa. 160; Insurance Co. v. Brownback & Co., 1 Superior 183; Coal Co. v. Rodgers, 108 Pa. 147. This, also, where plaintiff had knowledge of *ultra vires* nature of the contract. Parrish v. Wheeler, 22 N. Y. 494. The contract being enforceable, the claim must be allowed.

PRICKETT for defendant.

The fact that a contract will be beneficial to a corporation does not authorize the corporation to make it, if it is *ultra vires*. Davis v. Old Colony R. R. Co., 131 Mass. 258; People v. Campbell, 144 N. Y. 166; Dresser v. Traders' National Bank, 165 Mass. 120. A corporation is not liable on an *ultra vires* contract. Mr. Justice Gray, in 131 U. S. 371. This question is not between the original parties to the contract, but by a creditor on an *ultra vires* contract, which *ultra vires* business resulted in the insolvency of the corporation, as against those whose claims resulted legitimately.

OPINION OF THE COURT.

It appears from the facts before the court that the Troy R. R. Co. was chartered to carry passengers and freight. In order to increase the business of the corporation, it entered into a contract by which it leased iron mines and a furnace, and operated the same. It purchased for fuel for this purpose 1,000 tons of anthracite coal from the Pennsylvania Coal Co., for $4,000, who was aware of what it was to be used for. The operation of the furnace proved a losing operation, and not enough was realized to pay the necessary outlay. The R. R. Co. became insolvent, its property was sold under judicial proceedings. The amount realized for the same was $200,000. The indebtedness for equipment, cars, engines, rails, ties and operating expenses amounts to $210,000.

The Pennsylvania Coal Co. claim to participate in the distribution of the fund, which is resisted by the creditors to whom the moneys are due for cars, etc., and the question which is brought before the court is, shall the auditor allow a *pro rata* to its claim, or distribute the whole fund to the others?

It seems that it may be stated as a rule in Pennsylvania, that as between the corporation and a creditor on an *ultra vires* contract, which has been partly performed and the corporation has received the benefits, it is estopped from setting up the defense, in an action for the consideration against it, that the contract was beyond the authority, and, therefore, it is not liable. 83 Pa. 160; 128 Pa. 110; 122 Pa. 565. For instance, in Pittsburg, etc., R. R. Co. v. Shaw, it is held, that although it may be *ultra vires* for a railroad company to maintain a telegraph line, yet this will be no defense to an action by its contractor for compensation under a contract for building the line. And again, it is held in 137 N. Y. 417, that if a corporation engages in a business not in itself unlawful or wrongful as against the State or the public, and while engaged in this business incurs an obligation to a third person, which would be good against it if it had power to engage in that business, it will not be heard to set up the plea of *ultra vires* when sued to enforce that obligation.

It was argued by the plaintiff that the leasing of the furnace, and operation of it, were necessary aid to the railroad, and as the facts state, also to increase the business of the corporation, and therefore the contract was not *ultra vires;* but if you concede this power to it you at once give to it the authority under this pretext to erect manufacturing establishments, etc., and enter recklessly into unlimited field of enterprises, which were never contemplated by the Legislature or by its shareholders, and which is in no sense a legitimate incident to its actual express authority.

But in the present case the circumstances are different; it is not the corporation which is claiming that the contract was *ultra vires;* it is the creditors of the corporation under contracts made while the corporation was acting within its authority. There seems to be no decision in this State on this point, but it has been held, in Bank of Chattanooga v. Bank of Memphis, that as between the creditors of an insolvent bank, those whose debts were created under a lawful power, given by the charter, must be preferred to those who claim under a contract that the bank, under its charter, had no power to make. In such case the bank is not estopped from denying the illegality or want of power to make the contract. 9 Heisk (Tenn.) 408.

Do the creditors under valid contracts

stand in exactly the same place as the corporation itself, which is estopped from setting up the plea of *ultra vires?* We think they do not, because they were undoubtedly innocent, and could not prevent the corporation from entering into the *ultra vires* contract with the Pennsylvania Coal Co., who were chargeable with the knowledge of the *ultra vires* business of the railroad company.

The court is, therefore, of the opinion that it would be doing a great injustice in the present case to allow the creditors under the *ultra vires* contract to come in and share *pro rata* with the other creditors.

Judgment for the defendant.

R. A. HUBLER, J.

OPINION OF THE SUPREME COURT.

We are not able to reach the conclusion arrived at by the learned Court of Common Pleas.

The railroad company had, it is true, no authority to conduct the business of manufacturing iron, and executory contracts between it and others, known by the latter to be made in the prosecution of the illegitimate business, would not be specifically enforced, nor would damages for the non-fulfillment of them, be recoverable. Bosshardt v. Crescent Oil Co., 171 Pa. 109; Wilmington & Reading R. R. v. Berks County Railroad, 6 W. N. C. 115; Culver v. Reno Real Estate Co., 91 Pa. 367.

If, however, the other party has performed in whole or in part, he is entitled to recover the contractual consideration, or an equitable part of it. Oil Creek & A. R.R. v. Penna. Transportation Co., 83 Pa. 160; Wright v. Antwerp Pipe Line Co., 101 Pa. 204; Boyd v. American Carbon Black Co., 182 Pa. 206.

The Penn. Coal Co. has sold and delivered 1,000 tons of coal to the railroad company, which owes it therefor $4,000. The learned court below concedes that the coal company may compel the corporation to pay it, if it has available assets. It holds, however, that none of its assets are available until the debt originating in transactions pertaining to the proper business of transportation, have been paid in full.

It does not appear from what property the assets for distribution have been obtained. While the operation of the furnace was a losing one, it is not shown that that of the railroad itself, was more profitable. Perhaps the furnace business was *less* unprofitable than that of transportation. If the illegitimate business had been profitable, would the creditors of the corporation consent that such of them as dealt with it, with respect to the furnace, should be paid in preference to themselves out of so much of the assets as represented the profits made?

The business of conducting a furnace is rather public. It would be difficult to believe that creditors might not be aware of it. It is not found that the general creditors were ignorant of it. The principle is well established that one who becomes a creditor with knowledge of the illegitimate purchase by the corporation, of shares of its stock, cannot assail the validity of the purchase, and make the vendor of the stock liable to him. No act can be more *ultra vires* than that, from the standpoint of the law of many jurisdictions. It would be difficult to justify the doctrine that a creditor knowing when he becomes such, that the corporation is engaged in an *ultra vires* business, may have debts arising therefrom, declared, so far as he is concerned, invalid.

Differences among creditors with regard to preference in payment, may exist as the result of well ascertained liens. In this case the attempt is made to classify debts in respect to their meritoriousness, or legality. The law refuses, generally, to inquire into the meritoriousness of the debts. It distinguishes not between debts springing from contracts or from judgments founded on torts; loans of money from a half-benevolent intention to help the corporation, and debts contracted with no altruistic complexion; late debts and earlier debts. We see no sufficient reason to consider the classes of business, and to distinguish the debts springing from them respectively. When the law has said that the creditor in an *ultra vires* contract, may enforce it against the corporation, it has practically said that it is to rank as other debts.

We have already suggested that the illegitimate business might be profitable and the legitimate unprofitable. The larger part of the assets for distribution might be the product of the illegitimate business.

If in the actual case, the *ultra vires* creditors should be postponed to the legitimates, in the case just supposed, the former should be preferred to the latter. No court, it is probable, is ready to take that position,

We have found no trace of the disposition, while giving validity to a debt as against the corporation, to stigmatize and disfranchise it, as respects other creditors except in the case from Tennessee, cited by the learned court below, access to which we have not had. We are not able to follow its lead, if it teaches what it is understood to teach, by the Court of Common Pleas. The learned court suggests that creditors could not prevent the corporation from entering into *ultra vires* contracts, and therefore should not be bound by them because the corporation is. But, if they are to be permitted to obtain a preference over *ultra vires* creditors, it might be better to allow them to intervene in the affairs of the corporation, in order to prevent the making of illegitimate contracts. Unwise, preposterous and ruinous contracts, within their powers, are often made by corporations. Are we to say that the creditors in wise contracts, are to be allowed to claim a preference over those in unwise ones, because they cannot prevent the making of the unwise ones?

Decree reversed. The fund will be distributed *pro rata* among the creditors.

THE TOILET ARTICLE CO. vs. JOHN AKERS.

Contracts in restraint of trade—Liquidated damages and penalties for breach of contract discussed.

STATEMENT OF THE CASE.

Akers, a druggist, agreed to take $400 worth of fancy soaps from the plaintiff, providing that should the latter sell soaps to any other druggist in the county, he, Akers, should be allowed to return such soaps as he had not already sold, and be relieved from paying for those sold. The company, two weeks later, sold $25 worth of soaps to another druggist in the county, but twelve miles distant. Within that time Akers had sold $200 worth of his soap. When demand for the $400 was made, he tendered back his remaining soap and insisted on his exemption from any duty to pay. This is assumpsit for $400. The plaintiff contending contract prohibiting sale to others was void. That it was penalty and not liquidated damages.

SPENCER attorney for plaintiff.

Contracts in restraint of trade are not sustained by the courts. Compus v. Rochester, 56 Pa. 194; Hardinson's Appeal, 78 Pa. 196; Kuler v. Taylor, 53 Pa. 467; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173.

Whether a sum mentioned in an agreement to be paid for nonfulfillment of the contract is a penalty or liquidated damages is a question for the Court—and judgment must follow the decision. Bigony v. Tyson, 75 Pa. 157; Teumreth v. Mauser, 12 Phila. 366; Graham v. Bickham, 2 Yeates 32.

LONG attorney for defendant.

Where contract in restrainer of trade is partial, reasonable and founded upon a consideration it is valid and will be enforced. A. & E. Enc., vol. 3, page 882, sec. 52; Hall's Appeal, 60 Pa. 458; Morris Run C. Co. v. Barclay Coal Co., 68 Pa. 173; McClurg's Appeal, 58 Pa. 51; Sompers v. Rochester, 56 Pa. 194; Fullers v. Hope, 163 Pa. 62.

An agreement "to forfeit and pay" a definite sum on the happening of a certain event naturally imports that sum is liquidated damage and not a penalty. Streeper v. Williams, 48 Pa. 450; Malone v. Phila., 147 Pa. 416; Clemens v. R. R., 132 Pa. 445; Matthews v. Sharp, 99 Pa. 560; Kelso v. Reil, 145 Pa. 606.

OPINION OF THE COURT.

In order that the plaintiff recover in this case it is necessary that the contract was void as being illegally in restraint of trade, or that the sum forfeited was a penalty and not liquidated damages.

A fundamental principle of the law of contracts is that a restraint is not unreasonable if it is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. Clark on Contracts, p. 446, § 195; 110 Pa. 3; 56 Pa. 194; 68 Pa. 173; 9 W. N. C. 272; 113 Pa. 579; 58 Pa. 51; 53 Pa. 467. The restraint in this case was reasonable. The extent of it was over a single county only. In order to induce the defendant to purchase such a quantity of soaps, he must have been persuaded by such inducement as the inference is that his

business was a large one locally and the plaintiff was unusually anxious to have him handle their goods. Such inference gathers weight from the fact that the Toilet Article Co. afterwards sold $25 worth of soap to a druggist but twelve miles distant. If they were desirous of making such a small sale comparatively at a short distance from the defendant's place of business, *a fortiori*, they must have been very insistent in their endeavors to persuade the defendant to handle their goods. Thus they made a contract with him which was to compensate him in case violation of it occurred. To permit them, now, to recover on the ground that it was a contract illegally in restraint of trade would be to approve bad faith on their part. They are compelled to act in good faith.

Good faith requires of a party who has sold the good will of his business, that she should do nothing which tends to deprive the purchaser of its benefits and advantages. 60 Pa. 458.

The second contention of the plaintiff company demands more serious consideration. Was the forfeiture a penalty or liquidated damages? No general rule is laid down by which to govern all cases as to what is to be regarded as a penalty and what liquidated damages. Hence, to determine whether a stipulated sum named in an agreement as a forfeiture for failure of compliance is intended as a penalty or as liquidated damages, it is necessary to look at the language of the contract, its subject matter, the intention of the parties as gathered from all its provisions, the ease or difficulty in measuring the breach in damages, and amount stipulated for; and from the whole to gather the view which equity and good conscience require should be taken of the case. 48 Pa. 458; 99 Pa. 560; 145 Pa. 106; 132 Pa. 445; 189 Pa. 198; 200 Pa. 249. We think this case, as measured by the adjudications laid down in the above cases, warrants the decision that the forfeiture in this case was intended as liquidated damages and not as a penalty. By the contract Akers was to take $400 worth of fancy soaps. A druggist who can make such heavy purchases of such articles must enjoy a very thriving trade, and must be one with whom any business firm would be quite desirous of dealing. His sales of other like articles would necessarily be large and to warrant his purchase of this amount from the plaintiff firm would mean a sacrifice on his part of efforts to dispose of other brands and of an accompanying inconvenience experienced in persuading his customers to buy this particular brand. To persuade Akers to buy, the Toilet Article Co., as a recompense for the extra labor, agreed to sell no other of their product to dealers in the same county. This extra inducement, we think, was necessary, and under the circumstances was a guarantee, the breach of which was in a small way only repaired by the returning of the unsold articles and a retention of the value of the amount sold. We presume this brand of soaps was not handled by Akers previous to making this contract. Such presumption is based on a fair interpretation of the facts of the case. If it was, the sales of them were small and the plaintiff made an extraordinary contract to increase them. In either case the company was greatly benefited, and to allow their contention would impose a hardship upon the defendant, contrary to equity and good conscience and to the spirit of justice of the law.

The difficulty encountered in measuring the damages suffered by the defendant by the subsequent violation of the contract by the plaintiff company further justifies our opinion that the forfeit was intended as liquidated damages. The extra effort incumbent on Akers to sell this article, the inconvenience meeting him in the efforts to induce his customers to buy this article, the risk of its not being a salable, staple article, and the danger of losing trade through such endeavors, would be illy recompensed by the profits made upon the article sold. To uphold the contention that Akers must have anticipated ample reward in such profits and thus decide the sum named as a penalty, in our judgment, would be placing an unwarranted construction upon the statement of facts. Applicable to the case before us is the rule laid down in 200 Pa. 249.

Deciding that the contract was not in restraint of trade, and that the forfeit was liquidated damages, judgment for the defendant is rendered.

GEORGE E. WOLF, J.

OPINION OF THE SUPREME COURT.

We are satisfied with the conclusion reached by the learned court below, in its lucid and able opinion.

The contract was to pay $400, unless the vendor should sell to any other druggist. The condition has been broken on which the $400 were to be paid, and therefore no payment can be exacted.

It is suggested that the contract restrained trade. So it did. But what would be the result? That the contract would be void? But the plaintiff asserts the contract by suing upon it. He surely cannot agree to sell soap *plus* exemption from the rivalry of other druggists, for $400, and collect the $400 for the soap without the exemption. He may repudiate the contract, but not at the same time, claim on it and denounce it as unlawful.

But, such contracts do not unlawfully restrain trade. As the learned Common Pleas suggests, the vendee may well agree to buy for re-sale a certain quantity of an article, if he is not going to have competition in the re-sale of it, when he would refuse to buy so much, or possibly any, if he were going to encounter that competition.

There is really no deprecable restraint of trade, for if the vendor did not make the agreement with A not to sell to B, or C, or D, he would not sell to A. He agrees not to sell to one in order that he may sell to another or in order that he may sell twice or ten times as much to another.

If there are twenty manufacturers of an article, each of them may agree to sell his entire product to X, X in that way would have a monopoly of the article. But such agreements are not invalid. They may in certain circumstances be beneficial, not merely to the parties (who must be the judges of their own interests), but to the public, of whose interests the courts occasionally constitute themselves the tutors and saviours. *Cf. passim*, 24 Am. and Eng. Ency. Law, 841 *et seq.*

Judgment affirmed.

JOHNS, ADMIN., vs. MALOY.

Death—Survivorship—Presumption of in a common disaster one of fact—Burden of proof.

STATEMENT OF THE CASE.

Adam Smith, his wife, Maria, and their two children, Thomas and Henry, perished in the recent theatre fire at Chicago. Smith carried $50,000 worth of insurance on his life in various companies. All the policies were made payable to his wife as beneficiary with a provision that if he survived his beneficiary named then payable to his estate. The companies pay the money into court and the present contest is among the heirs of Smith, the heirs of his wife, and the administrator of the children. There is evidence of Smith's good health and great strength, the robust condition of the children and the sickly state of the wife at the time of the fire.

WOLFE for plaintiff.

If there is evidence arising from the age, sex, or physical condition of the persons who perished, or from the nature of the accident and the manner of death of the parties, which tends to show that some one did in fact survive the others, the whole question is one of fact for the jury. 1 Greenleaf (16 Ed.) p. 126 and note. Such evidence exists in this case. Cited also Cowen v. Rogers, 10 L. R. A. 550; 1 Barbon, 264.

TYLER for defendant.

There is no presumption of survivorship, therefore the case must be disposed of as if it appeared that the parents and children died simultaneously. Jeffries v. Shillon, Vol. 7, Forum, p. 227, and cases therein cited; Cowenan v. Rogers, 10 L. R. A. 550; Newell v. Nichols, 75 N. Y. 78.

One who claims survivorship must prove it. Fuller v. Lenzie, 135 Mass. 468; Newell v. Nichols, *supra*. Cited also, Phila. City Pass. Ry. Co. v. Henrica, 92 Pa. 431.

RENO, J., absent.

OPINION OF THE SUPREME COURT.

The policies were payable to the wife, in the first instance. They were payable to the administrator of Smith, only if Smith survived her. Where is the burden of showing this survivorship? Plainly on Smith's administrator. Has he shown it?

There is evidence that Smith's health was good, and that he was of great strength, and that Mrs. Smith was in a sickly state at the time of the fire. It is

very evident that to decide that he survived her, would be to decide on a bare conjecture. There does not necessarily result from health and strength, a greater slowness of dying. If he was stronger, he possibly had a correspondingly greater strain on him. He was the natural protector of wife and children, and would exert himself the more severely, or, if there were any choice of dangerous positions, would probably take the more dangerous. Weak persons often show a surprising tenacity of life. We do not think that from such indecisive evidence as here presented, any inference could be drawn by reasonable men, as to which of the deceased was the last to succumb. *Cf.* Cowan v. Rogers, 10 L. R. A. 552; Jefferies v. Shellon, 7 Forum, 227.

It follows that the policy is payable to the administrator of the wife. Your verdict, therefore, gentlemen of the jury, will be taken for the defendant.

WARREN vs. BUCH.

Assumpsit for breach of contract—Damages that may be recovered in such action—Whether the defendant is presumed to have notice of a previous contract of the vendee—Pennsylvania rule.

STATEMENT OF THE CASE.

Timothy Warren entered into a contract with the Northern Railway Company to do certain excavating and filling, and it was stipulated that the said work should be completed within sixty days from April 1st, 1902, under a penalty of five hundred dollars ($500). Warren required the use of a steam shovel to complete the work within the period named, and purchased one from the defendant, Simon Buch, who agreed to deliver it on or before March 31st, 1902. The shovel was not delivered until May 1st, 1902, and the plaintiff was unable to complete the work for the railway as provided for in his contract, and was compelled to pay the forfeit of five hundred dollars. Besides plaintiff had employed workmen to begin operations on April 1st, and owing to the failure of the plaintiff to have the use of the shovel, the work cost him, the plaintiff, $300 more during the month of April than it would have cost him had the shovel been furnished. Again, after June 1st he was compelled to pay higher wages until the completion of the work on June 20th than he had contracted to pay in April and May, and this compelled an additional outlay of $425.

He sues to recover these sums from the defendant as damages incurred by reason of his breach of contract.

CARLIN for the plaintiff.

Where a breach by one party occasions injury to the other, which is susceptible of compensation in damages, it does not relieve the other from liability under the contract where both parties have gone on and performed it for some time thereafter. Robinson v. R. R. Co., 103 Mich. 610.

In contracts for the sale of goods the time of delivery is of the very essence of the contract. Worrington v. Wright, 115 U. S. 188; Liffists v. Wild, 167 Mass. 531.

COOK for the defendant.

Where a vendor fails to comply with his contract the general rule for the measure of damages is the difference between the contract price and the market price at the time of the breach. McHose v. Fulmer, 73 Pa. 365.

The damages claimed here are remote and a defendant cannot be held responsible for the remote consequences of his act. 106 Mass. 542; 78 Mass. 135; 101 New York 209; 115 New York 579.

The damages that can be claimed are those that naturally and ordinarily flow from the breach. Drill Co. v. Wagner, 91 Pa. 92; Pennypacker v. Jones, 105 Pa. 237.

OPINION OF THE COURT.

The question involved in this case is one of damages, arising from an alleged breach of contract, and the general rule is: Wherever one party to a contract has failed in performing what he has undertaken to do in favor of another contracting party, the latter is entitled to compensation in damages.

The general rule of damages is: That a party failing to comply with the contract is liable for the value of the goods in open market, at the time of his failure, so that if the plaintiff could have bought them when the contract was broken for a higher price, the difference is all that he can recover. McHose v. Fulmer, 73 Pa. 365; Culins v. Glass Works, 108 Pa. 220.

This question of damages is one for the jury as to the market value, who may de-

termine from the price before and after the day of delivery, and from other sources the actual market value. Kountz v. Kilpatrick, 72 Pa. 376.

From the evidence in the case it does not appear, that the plaintiff could not obtain another shovel on the market, nor does it appear that he tried to obtain one. It was his duty when the defendant did not supply the one contracted for, to try to obtain another, even if he could not obtain one of the same quality. It was his duty to get one even if it was of an inferior quality, and he could recover the actual loss, that is, the amount he would lose by its not being able to do the same amount of work, and the difference between contract price and market value. Culins v. Fulmer, 108 Pa. 220.

This contingency, whether the goods are on the market, is one which must be considered to be in contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not, but this rule would not apply here, as there may be many upon the market, as we suppose there are, for the statement of the plaintiff does not show they are not upon the market, nor does it show that plaintiff tried to obtain one and failed. Kountz v. Kilpatrick, 72 Pa. 376.

The damages in this case are also, in the opinion of the court, too remote. They are not such damages as ordinarily flow from such a breach of contract, nor can it be supposed they are such as were contemplated by the parties when they entered into the contract, or such as might be expected to follow its violation. Billmeyer v. Wagner, 91 Pa. 92; Pennypacker v. Jones, 106 Pa. 237.

It is not reasonable to suppose that the defendant knew or contemplated that plaintiff would have to hire so many men, or, that wages would advance, causing him the expense now claimed; nor was it communicated to him, that he would have to pay a certain sum for not completing the work at a fixed time.

If the rule asked to be adopted in this case would be used, where would the limit be? Why then the plaintiff could hire five times as many men, or employ 6 or 8 shovels as he saw fit. This rule would lead to the ruin of men, because from some event they could not perform their contract. Rochester Lantern Co. v. Stiles, 135 N. Y. 447.

We are of the opinion that the claim for damages is not justified by the facts in this case.

Judgment for defendant.

THOMAS LOURIMER, J.

OPINION OF THE SUPREME COURT.

The plaintiff, Warren, being in need of a steam shovel, ordered one from the defendant, Buch, who agreed to deliver it before March 31st, 1902. The shovel was not tendered until May 1st, 1902, at which time, however, it appears that the plaintiff accepted it. For this delay of a month and a day the plaintiff asks for a judgment for one thousand two hundred and twenty-five dollars, the amount of the loss which, it is not denied, he has suffered.

In the first place, it is urged that the plaintiff's acceptance of the shovel may fairly be interpreted as a waiver by him of the seller's default in the time of delivery. There are cases which decide that an acceptance is to be so regarded unless qualified by a reservation of the right to claim damages. Minneapolis Threshing Machine Co. v. Hutchins, 65 Minn. 89; Bock v. Healey, 8 Daly, 156. In the present case, however, the plaintiff doubtless expected each day that the ordered shovel would arrive promptly. The longer the delay, the more pressing became his need. Finally, when the shovel was tendered, his predicament left him practically no choice. It is settled that in such a case, unless there are other circumstances showing an intention to waive the seller's delay, the acceptance is not to be so construed. He cannot be said to take the goods voluntarily, but rather under a sort of duress or compulsion. Industrial Works v. Mitchell, 114 Mich. 29; Ruff v. Rinaldo, 55 N. Y. 664.

In contracts for the sale of goods the time of delivery is of the very essence of the contract. Worrington v. Wright, 115 U. S. 188; Lifferts v. Weld, 167 Mass. 531. The defendant's breach being admitted, we are unable to see how the court below should have seen fit to enter judgment in his favor. In any event the plaintiff is

entitled to nominal damages. But, as we will now show, we are of the opinion that in the present case they may justly be made very substantial.

As we understand the position of the learned court below, it is this: The measure of damages for the non-delivery of goods is the value of the goods, if the price has been paid; otherwise, the difference between the contract price and the market price. Since this rule is based on the theory that the buyer must satisfy his need elsewhere at the market price, and since the plaintiff does not appear to have pursued this course, he, therefore, has not suffered this damage. Again, all the claims for damages that he makes are for remote losses. Conclusion—he can recover nothing.

We are inclined to agree with both of the foregoing premises, but we think the conclusion is a *non sequitus*. Suppose the plaintiff had paid for the shovel at the time of ordering it. Surely he is entitled to interest on the price for the period of the delay in delivery. Edwards v. Sanborn, 6 Mich. 348. Again, suppose he did prefer to wait till the shovel ordered arrived. Surely he is entitled to the value of the use of a shovel for the period of the delay. We are told that "owing to the failure of the plaintiff to have the use of the shovel, the work cost him $300 more during the month of April than it would have cost him had the shovel been furnished." How did he conduct the work during April? We are not told. If he could do so, he doubtless rented a shovel elsewhere. Whether he did so or not, if the $300 claimed does not exceed the rental value of a shovel for one month, we are of the opinion that such a sum is an item of damage quite proximate enough to enter into the verdict. Brownell v. Chapman, 84 Iowa 504; Brown v. Foster, 51 Pa. 165; Griffin v. Clover, 16 N. Y. 489.

In Coal Co. v. Foster, 59 Pa. 365, the defendant agreed to furnish for the coal company a locomotive engine of a particular size. Such an engine was the only kind the company could use and they were not to be procured elsewhere. There was a delay in the delivery, and the company was compelled to transport its coal by horse-power, as it had done before. The trial court said that the measure of damages for the delay was the "ordinary hire of a locomotive during the period of the delay." On appeal it was held that as the latter accepting the order provided for a delivery of the engine on the track of the plaintiffs, the defendants must be regarded as having notice that the plaintiffs intended to use the engine at once. They, therefore, laid down the measure of damages to be the loss of the economy which would have been effected by the substitution of mechanical power for horse-power.

If the present contract contained a provision for the delivery of the shovel at the field of the plaintiff's operations on the Northern Railway, the defendant may fairly be held to the measure of damages laid down in Coal Co. v. Foster. This would doubtless cover the $300 claimed. In any event, however, he can recover the rental value of the shovel, as stated above.

Since the decision in Hadley v. Boxendale, 9 Ex. 341, cases of this class have "resolved themselves into a continuous commentary upon it." This leading case, as in the case before us, involved the measure of damages for delay in delivering a piece of machinery. The defendant was not held liable for the losses incident to the stopping of a mill in which the machinery was to be used, because there was no evidence that he had been made aware that such a loss would result from his delay. Under the rule of this case, which has been repeatedly approved in Pennsylvania, we agree with the court below that the $500 item and the $425 item are for losses too remote to be allowed. The defendant does not appear to have had any notice of the terms of the contract between the plaintiff and the Northern Railway Company. The counsel for the plaintiff has laboriously argued that the $500 was liquidated damages and not a penalty, but under the view we have taken this becomes entirely immaterial now, whatever may be its importance as between the plaintiff and the railroad company.

Judgment reversed, with *v. f. d. n.*

IN RE ESTATE OF BERT WAPLES.

Capacity of an illegitimate to inherit—Status of an illegitimate—Act of July 10, 1901, construed.

STATEMENT OF THE CASE.

Bert Waples, deceased, died November 27, 1901, leaving real and personal property. He left to survive him two sisters and a niece, daughter of a deceased brother, and a nephew, a son of a deceased sister. Before the auditor, in September, 1903, it was shown that the son of the deceased sister was a bastard. The auditor decided that the son could not take the mother's share. Exceptions to his report were filed.

CARLIN for the plaintiff.

Cites Act of April 27, 1855, Act of July 10, 1901.

The Legislature has power to remove the taint of illegitimacy either by a general or a special law for all purposes of future inheritance. Brown on Decedents' Estates, Vol. 1, page 248.

FLYNN for the defendant.

Cites Act of April 8, 1833; April 27, 1855; 1 P. & L. 2420; Act of June 14, 1897; 3 P. & L. 349; Act July 10, 1901.

The title of the Act of July 10, 1901, provides that it is "An act to regulate and define the legal relations of an illegitimate child or children, its or their heirs, with each other, and the mother and her heirs."

The act makes no provision for repealing the Act of 1833, but is intended to regulate the legal relations of the mother and the child.

The title of the act may be esteemed to have some of the qualities of a preamble, and may, therefore, be used as a good means for collecting the intent of the makers.

OPINION OF THE COURT.

Although the efforts of counsel on both sides were extended in an attempt to procure authority along the lines involved in this case, they were in vain, and the court has likewise been unable to find anything in the books, either State or county decisions, that applies to the point at issue. The decision seems to hinge on the construction of a few words in the Act of Assembly of July 10, 1901, defining the legal relation existing between a bastard child, or children, its or their heirs, and the mother of such bastard child and her heirs.

Section I of the act says, *inter alia:* "But the mother and her heirs, and her illegitimate child and its heirs, shall be mutually liable, one to the other, and shall enjoy all the rights and privileges, one to the other, and in the same manner and to the same extent as if said child or children had been born in lawful wedlock."

Section II enlarges on the rights and privileges of the mother and the children, as follows: "The mother of an illegitimate child, her heirs and legal representatives, and said illegitimate child or children, its or their heirs and legal representatives, shall have capacity to take or inherit from or through each other, personal estate as next of kin, and real estate as heirs in fee simple, or otherwise, under the intestate laws of this Commonwealth, in the same manner and to the same extent, subject to the distinction of half-bloods, as if said child or children had been born in lawful wedlock."

Section IV gives the *intent* of the act, as follows: "The intent of this act is to legitimate an illegitimate child and its heirs as to its mother and her heirs."

We place the turning point at the words, "and her heirs," in section IV of the act. Who are the heirs of the mother? If Bert Waples is an heir of the mother of the bastard, then the mother's son can take through her, her share in the estate of Bert Waples.

The word "heir" has been defined to mean: "He upon whom the law casts his *ancestor's* estate immediately on the death of the ancestor." Am. & Eng. Encyc. of Law, 1st Ed., Vol. 9, p. 357.

Can it be said that Bert Waples is an "ancestor" of this bastard son? We think not; we construe the word "ancestor" to relate exclusively to the direct line of lineal descendants and ascendants. Waples is only collaterally related. We believe that the word "heirs" in the statute cannot relate to collateral relatives, and in this case the only ancestor of the bastard known to the law is the sister of Waples. Bouvier's Law Dictionary defines the word "ancestor" to mean: "One who has preceded another in a direct line of descent; an ascendant; a former possessor; the person last seized."

In this case the sister of Bert Waples was not seized, for she died before the estate could vest in her; following this line, the son could not inherit anything *from* her in it.

The remaining question is: Could he take anything *through* her in it? We are of opinion that, construing the statute strictly and in accordance with the intent expressed in section IV, as the mother of the bastard was not strictly an *heir* of Waples, but only collaterally related, and as the act does not legitimatize the bastard as to the collateral relatives of the mother, he is unable to take her share from Waples in connection with the heirs, under the intestate laws of this Commonwealth.

The exceptions to the report of the auditor are dismissed, and the report confirmed.

GILLESPIE, J.

OPINION OF THE SUPREME COURT.

At common law, the illegitimate was *nullius filius*, the son neither of father nor mother. Hence neither parent, nor the kin of either parent, could inherit from or through it, nor could it, or its heirs, inherit from the parents or their kin.

A partial legitimation began with the Act of April 27, 1855, 1 P. & L. 2420. The mother and the child were recognized by that act as of kin, simply in order to enable each to inherit from the other. Relatives of the mother could neither inherit property from nor transmit it to the child. Hence, her brothers and sisters could not inherit from the child. Grubb's Appeal, 58 Pa. 55. Even the children of the predeceased child could not inherit from the mother. Steckel's Appeal, 64 Pa. 493. Illegitimate children of the same mother, could not inherit from each other. Woltemate's Appeal, 86 Pa. 219. The Act of June 5th, 1883, 1 P. & L. 2420, enabled them to inherit from each other, when the deceased left to survive him, neither mother nor legitimate issue.

The Act of June 14th, 1897, 3 P. & L. 349, extended the classes capable of inheriting, in cases of illegitimacy, so as to embrace the children and their issue, the mother and the grandmother. All these were given "capacity to take or inherit from each other." The act of June 10, 1901, P. L. 551, made all children of the same mother, whether legitimate or illegitimate, and dying without lawful issue, capable of inheriting from each other, to the exclusion of the grandmother.

At the same session of the legislature, the act, P. L. 639, was passed, which it is inexpedient to quote. After an examination of it we have reached the conclusion that its purpose was to "legitimate" the bastard so far as its mother was concerned, but to allow it, as respects its father, to be, as heretofore, the son of nobody. The "common law doctrine shall not apply, as between the mother and her illegitimate child or children." The illegitimate child and the mother "shall have capacity to take or inherit from or through each other." To inherit through the mother, can mean simply to inherit from some one from whom, had she been alive, she would have inherited; to inherit by representation. No distinction is made between ancestors of the mother; or collateral relatives of whom she might be heir. From the father or the mother of the mother, the illegitimate could inherit. Why not from her brother or uncle? The act does not discriminate.

The fourth section of the act declares that the intent of it is to "legitimate" the child and its heirs, as to its mother and her heirs, (and not as to its mother and those of whom she would, if surviving, be an heir). But the object of the section was evidently to contrast the legitimacy of the child, as respects the mother, with its perpetuated illegitimacy as respects the father. The direction in section 2, that the child shall have capacity to inherit through as well as from the mother, shows that the intent of the act is not fully expressed in the 4th section, for to inherit through the mother, is to inherit from one to whom she, had she survived, would have been an heir; and not from one who would be her heir.

We think the intention of the legislature was to destroy the distinction between legitimates and illegitimates, so far as the mother and those related through her to the children are concerned.

It follows that one fourth of the estate of Bert Waples should be paid to the nephew.

Decree reversed with *procedendo*.

JOHN PETERS vs. SOLOMON BRINDLE.

Husband and wife—Validity of agreement to separate—Liability of husband for necessaries furnished to the wife after the separation.

STATEMENT OF THE CASE.

Solomon Brindle was intermarried with Catherine Jones. They failed to live amicably together and finally agreed to separate, and a formal agreement was entered into, providing that the husband should pay $1,000 to his wife, and they were to live separate and apart hereafter, she releasing all right of dower and interest in his estate, and all claims for support and maintenance. They so lived for five years. During this time she expended the money so received, and purchased from the plaintiff, John Peters, groceries and provisions necessary for her support, amounting to the sum of $100. The latter was aware of the terms of the agreement of separation. She being unable to pay, Peters brought suit against her husband, and asks for judgment on the facts stated.

FERGUSON and OWEN for the plaintiff.

The husband is liable for necessaries supplied to the wife unless she has competent provisions from him or from some fund of his own. 2 Ashmead 140.

The deed of separation was not binding, as confidential relations existing between the parties requires a free and full disclosure by the husband of all his property, and the consideration for the separation was wholly disproportionate to the estate. 195 Pa. 26.

OYER and MCALEE for the defendant.

Agreements for the separation of husband and wife are valid; provided their object be actual and immediate and not a contingent future separation. Lehr v. Beaver, 8 W. & S. 102; Hutton v. Hutton, 3 Pa. 100; Hitner's Appeal, 54 Pa. 110.

The husband may bind himself to give to his wife certain money and property, and the wife may agree to release him and his estate from all claims for maintenance and interest in his estate. Com. v. Richards, 131 Pa. 209.

A party who deals with a married woman known to be living apart from her husband, is put upon inquiry as to the cause of the separation. Com. v. Richards, *supra;* Carey v. Patten, 2 Ash. 140.

OPINION OF THE COURT.

The question arising upon the facts of the case is: Are articles of separation, as entered into, valid and binding upon the parties, or void and subject to repudiation at will? Presumably, one of the first cases in Pennsylvania decided upon this point is Hutton v. Duey, 103 Pa. 100, and decided in 1846. In this case Judge Rodgers laid down the rule that deeds for separation of husband and wife are valid and effectual both in law and in equity, provided their objects be actual and immediate and not a contingent or future separation. Also Lehr v. Beaver, 8 W. & S. 102, arose about the same time and was decided in the same manner on similar point. In Dillinger's Appeal, 35 Pa. 360, Judge Woodward held that such articles of separation, while not destroying relation of husband and wife for some purposes, did amount to a total surrender of all property rights. If there be in any case a reconciliation, waiving or abandonment of the deed, it would have become invalidated. Hitner's Appeal, 54 Pa. 110. But there is no evidence to that effect in this case, instead, facts show that deed had been faithfully carried out for period of five years.

In nearly all the early cases a trustee was appointed to carry out such agreements, but the present undoubted weight of authority seems to be that there may be a valid agreement for separation directly between husband and wife without the intervention of a trustee, which courts will sanction. Hutton v. Duey, *supra.* Garver v. Miller, 16 Ohio 527; Randall v. Randall, 27 Mich. 563. In this former case Mr. Justice Clark says "that a valid agreement may be made for a separation between husband and wife and for an allowance for her support, where separation is inevitable and immediate, is now too well settled to admit of discussion." There seems to be no doubt that such agreement must be based upon a good consideration and must also be reasonable in its terms. Scott's Estate, 147 Pa. 102. And, there is also no doubt that if such agreement be entered into by one party by reason of fraud, such as a gross misrepresentation by the husband as to amount and value of property owned by him, that such agreement would be declared void by the courts. A contract of this nature cannot be sustained unless it was entered into with full knowledge of both parties, necessary to

enable them to act intelligently and understandingly. Frank's Appeal, 195 Pa. 26.

We believe there was such understanding in present case. There is no circumstance given from which we can infer fraud upon the wife, neither coercion or concealment, and conclusion is that she was fully aware of conditions as existed at time of separation.

All requirements for a valid separation being present in this case we are disposed to treat it as such and direct judgment to be entered in favor of the defendant.

FLEITZ, J.

OPINION OF THE SUPREME COURT.

If the agreement for separation between Solomon and Catherine Brindle was valid, those who sold goods to her were bound to know of it and were affected by its terms. Peters in fact knew of the agreement. He could not regard her, in making purchases as the agent of the husband. Carey v. Patton, 2 Ashm. 140.

Could Mrs. Brindle avoid the articles? They had "failed to live amicably together." They agreed immediately to separate. They did immediately separate. They have remained separate for five years.

No intimation is given that any fraud was practiced on Mrs. Brindle. The amount of money given to her, $1,000, is comparatively small, but we have no information as to the size of Solomon Brindle's estate at the time of the making of the articles. The $1,000 may have been a large proportion, or even all of that which he had. Frank's Estate, 195 Pa. 26; Commonwealth v. Richards, 131 Pa. 209.

In the absence of evidence of a great disparity between the money given to the wife, and the property of the husband, we do not think the burden is on the husband to show that he did not deceive or constrain his wife into the acceptance of the provision, or accept from her, ignorant of his financial state, the renunciation of her rights. The burden, rather, would be on the plaintiff.

The participation of a friend or trustee, in the article of separation, is not necessary to its validity. Com. v. Richards, 131 Pa. 209, and case there cited.

Judgment affirmed.

COMMONWEALTH vs. SALTONHALL.

Character evidence—Testimony of accomplice—Duty of court not to "obfuscate" discussed.

STATEMENT OF THE CASE.

Saltonhall, 45 years old, and Adams, only 19, were arrested for burglary on suspicion. Adams confessed at once, implicating Saltonhall. The Commonwealth, intending to use him as a witness, had Saltonhall only indicted.

Adams was the only witness for the Commonwealth except Janney, who swore that he saw them about forty feet from the house running away from it about 11 p. m., and that the burglary must have occurred between 10 and 11 p. m.

Witnesses for Saltonhall, twenty-five in number, testified to his good reputation for honesty, law-abidingness, etc.

The Commonwealth furnished no impeaching character evidence.

The Court charged: "If you have doubt of defendant's guilt, consider the evidence as to his character. Would such a man be likely to commit so grave a crime? If, however, you are quite convinced that Adams is a truthful man, and has told the truth here, you need not trouble yourselves with Saltonhall's character. You may, however, oppose the improbability of Saltonhall's doing the act, having the character he has, to the probability that Adams has told the truth, and if doing so, you doubt reasonably, the guilt of Saltonhall, acquit him."

YOCUM, attorney for appellant.

In felonies or misdemeanors, court should charge jury not to convict on the uncorroborated testimony of an accomplice. Greenleaf on Evidence, sec. 380; Rex v. Foster, 8 C. & P. 106; Carroll v. Com., 84 Pa. 107; Com. v. Holmes, 127 Mass. 424.

Evidence of good reputation is substantive evidence. It is not a mere makeweight. Sayor v. Com., 21 Sup. Ct. 75; Com. v. Bleary, 135 Pa. 64; Hanney v. Com., 116 Pa. 322; Heine v. Com., 91 Pa. 145.

HOUCK, attorney for appellee.

A jury may convict in Pennsylvania on the uncorroborated testimony of an accomplice. Watson v. Com., 28 Pittsb. L. Jr. 89; Cox v. Com., 125 Pa. 94; Com. v. Craig, 19 Sup. Ct. 94.

Evidence of good character is substantive, and the court presented this with

sufficient clearness. Com. v. Carey, 2 Brew. 406; Heine v. Com., 91 Pa. 145; Hanney v. Com., 116 Pa. 322; Com. v. Cleary, 135 Pa. 64; Kilpatrick v. Com., 31 Pa. 198.

OPINION OF THE COURT.

This appeal raises two questions: 1st. Whether the charge of the court was erroneous; and 2d. Whether it was necessary for the court to give special instructions as to the weight to be given to the testimony of an accomplice.

The first point, in which it was alleged that the court committed error, was in the charge of the court to the jury. Let us consider the first sentence: "If you have doubt of defendant's guilt, consider the evidence of his character." That is to say, that if, after considering all the evidence except that of character, they should still be in doubt that they could consider the evidence as to character. In Heine v. Com. 91 Pa. 145, the charge of the lower court was similar to that of the present case. The Supreme Court said: "The learned judge of the court below committed error in saying to the jury, "If a man is guilty, his previous good character has nothing to do with the case, but if you have doubt as to his guilt, then character steps in and aids in determining that doubt. The effect of this was to give the evidence of good character no weight whatever, for if the other testimony left in the minds of the jury a reasonable doubt of the defendant's guilt, this of itself, without more, entitles him to an acquittal. Evidence of good character is not a mere make-weight, thrown in to assist in the production of a result that would happen in all events, but it is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal." In Hanney v. Com. 116 Pa. 322, the lower court charged: "If you believe that the testimony in this case clearly points the guilt of John Hanney, then his previous good character should have no weight in determining the question of his guilt or innocence. If, however, you think that the Commonwealth have made out but a weak case, that while possibly it might be sufficient for conviction, still the case is a weak one, there the testimony as to good character ought to have weight with you, with strength sufficient to raise a reasonable doubt in his favor, which reasonable doubt would inure to his acquittal." The Supreme Court said: "In criminal prosecutions, the evidence as to the good character of the defendant is to be regarded as evidence of the substantive fact, like any other facts tending to establish defendant's innocence, and it ought to be so regarded by court and jury. It is true, where the Commonwealth has clearly and indubitably established defendant's guilt, good character is of no avail, but in such event the same may be said of any other evidence, however positive, which defendant may have given; nevertheless, to say to the jury in the case supposed, that the evidence is to be disregarded, would clearly be error, for of the evidence and its effect, the jury are the sole judges. Character is of importance in this, it may of itself, in spite of all evidence to the contrary, raise a reasonable doubt in the minds of the jury and so produce an acquittal. An honest man may, through malice or otherwise, be charged with crime, and his life or liberty be endangered by fallacious circumstances or perjury, and he may be able to produce no evidence to prove his innocence except his own oath, and if in such a case a blameless and unstained character are of no avail, are a mere make-weight only in a doubtful case, his condition is a sad one; but, fortunately, for the upright man so situated, we have got beyond all doubt on this subject, and have established the doctrine that evidence of good character is to be regarded as a substantive fact like any other tending to establish defendant's innocence, and ought to be so regarded by court and jury." The above principles have been upheld in Com. v. Cleary, 135 Pa. 83; Com. v. Sayars, 21 Pa. Sup. 75. The conclusion of the court, therefore, is that the first sentence of the charge is erroneous.

The next sentence of the charge is: "If, however, you are quite convinced that Adams is a truthful man, and he told the truth here, you need not trouble yourselves with Saltonhall's character." In Com. v. Hanney, *supra*, the Supreme Court said: "It is true where the Commonwealth has clearly and indubitably established the defendant's guilt, good character is of no avail, but in such event the same may be said of any other evidence, however positive, which defendant may have given; nevertheless, to say to the jury that the

evidence is to be disregarded, would clearly be error, for of the evidence and its weight, the jury are the sole judges." Consequently, it was error on the part of the lower court to take away from the jury the right to consider the evidence of defendant's character, no matter how overwhelming the evidence of the Commonwealth is, as the jury might disregard it all and acquit, which they have a right to do.

In the conclusion of the charge the court said: "You may, however, oppose the improbability of Saltonhall's doing the act, having the character he has, to the probability that Adams has told the truth, and if doing so, you doubt reasonably the guilt of Saltonhall, acquit." This portion of the charge was in accordance with the rules of evidence as regards character evidence, as it allowed the jury to consider the evidence as to character in connection with the other evidence, thereby instructing the jury that it was substantive evidence in itself.

This charge is erroneous as to the first part, but correct as to the balance. The question then is, whether the latter part wipes out the mistake made by the court in the first part of the charge. In Com. v. Sayars, 21 Pa. Sup. 75, the lower court, in the first part of his charge, stated that good character should be considered in a doubtful case, or in a case where after a summing up of all the testimony carefully, the jury are in an equilibrium or almost balanced. Later in the charge the court said that good character is substantive and should always be considered. In this case the Superior Court held that the charge was misleading and contradictory, because it presented to the jury as a legal definition of good character two antagonistic and inconsistent statements as to the effect to be given to good character by the jury in its deliberations. It is difficult to determine what instruction the jury accepted as the law. It is apparent they are contradictory, and the liberty of a citizen should not be imperiled by repugnant statements of the effect to be given to good character by a jury. The same error was committed by the court below in the case at bar. His charge to the jury was inconsistent and contradictory. It was highly important to the defendant that the jury understand clearly what effect was to be given to the character evidence, as the Commonwealth relied almost exclusively on the testimony of an accomplice, whose testimony should be received with caution. The first assignment of error is sustained.

The second assignment of error relates to whether the court below committed error in not instructing the jury that the evidence of an accomplice should be received with caution. It is a rule of evidence that the degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. Such testimony should, however, be weighed with caution. The jury may, if they see proper, act upon the evidence of an accomplice without any corroboration of his statements. It is usual to advise juries not to convict on the testimony of an accomplice alone and without corroboration. Carrol v. Com., 84 Pa. 113; Kilrow v. Com., 89 Pa. 480; Com. v. Carey, 2 Brew. 406. In Com. v. Cox, 125 Pa. 100, the court, in answer to a point, said that there must be corroboration of the accomplice in a material point. The Supreme Court said that this was more favorable to the defendant than he was entitled to. A jury may believe an uncorroborated acccomplice, and if his testimony produces in their minds a conviction of defendant's guilt, they may convict. If the testimony of the accomplice, his manner of testifying, and his appearance upon the stand impress a jury with the truth of his statements, there is no inflexible rule of law which prevents a conviction. It is for the trial judge, who also heard the witness, noticed his manner and appearance upon the stand, and who can judge equally with the jury as to his credibility, to say whether he is satisfied with the verdict. If both jury and court are satisfied that he has told the truth, there is no reason why the verdict should not stand. No case in Pennsylvania has gone so far as to expressly decide that it was necessary for the court to caution the jury in regard to the testimony of an accomplice, although from the opinion of the court in Cox v. Com., *supra*, it would seem that if the trial court was satisfied with the verdict that it would be sustained by the Supreme Court. In this case, however, there has been very material corrob-

oration in the unimpeached testimony of Janney, who saw the defendant and the confessed accomplice, Adams, near the place where the robbery was committed at or about the time of its commission. It shows the possibility of their having committed the crime. Where there has been corroboration, it seems unnecessary to give any special instruction as to the weight to be given to the accomplice's testimony. It would be necessary, however, where there has not been any corroboration of the accomplice's testimony. In the case at bar, as the court and jury were satisfied with the verdict, it will not be set aside on that ground. The second assignment of error is overruled, however, as the trial court committed error in its charge to the jury. The cause will have to go back for a new trial.

Judgment reversed with *venire facias de novo*.

JAMES, J.

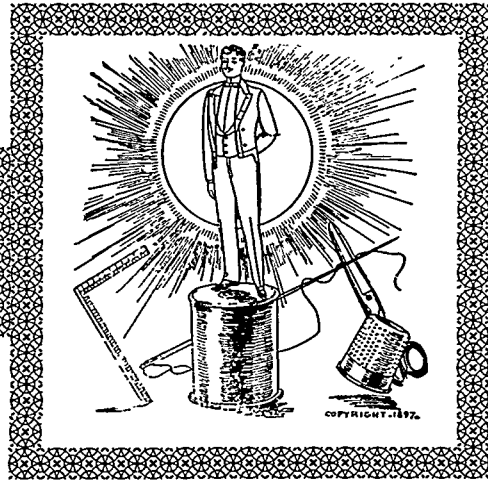
OPINION OF THE SUPREME COURT.

The criticism by the Superior Court of the first part of the charge of the trial court is doubtless correct. It does virtually tell the jury that they need not consider the character evidence until they satisfy themselves whether they "are quite convinced that Adams is a truthful man and has told the truth here." But these words are immediately followed by an explicit direction that they may oppose the improbability of Saltonhall's guilt, founded on his character, to the probability of Adams' testimony; and that, if thus opposing the former to the latter, they reasonably doubt Saltonhall's guilt, they should acquit him.

We differ from the learned court below as to the effect of these instructions on the jurors' minds. If they were dolts, they were probably obfuscated by the court's charge, but if they had that modest modicum of good sense and intelligence that often characterizes jurors, they probably understood that they were to consider the character evidence in determining whether to believe Adams. We scarcely think the danger that there was misapprehension, great enough to justify a reversal. It must be borne in mind that there is always a risk that even the clearest and most lucid instructions will be misunderstood by a jury. The use of the most precise and terse expressions does not guarantee a correct interpretation. The question is always one of probability. Cases would be rare in which the appellate court, if a wise one, could feel *sure* that there had been no misunderstanding on the part of any juror. The instruction in Kilpatrick v. Commonwealth, 31 Pa. 198, though more susceptible of misunderstanding than that of the court below, was not deemed a justification for a reversal.

With the doctrine of the learned Superior Court, concerning the instruction with regard to the testimony of an accomplice, we are quite satisfied.

Judgment reversed and that of the Oyer and Terminer reinstated.



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